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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

DAVID DIXON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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118 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's preliminary injunction barring the Secretary from applying regulations under which a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. The named respondents are David Dixon, Ricardo Ramirez, Ophelia Casey, Dominga Carrasquillo, Joanne Lockett, Eulalia Terez, Carmen Feliciano and Tomasina Gonzalez. In addition, the district court certified the following class of plaintiffs (App., *infra*, 69a-70a):

> All persons in the State of New York who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, and whose benefits have been or will be denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920 (c) and .921 (1982), and Social Security Ruling 82-55 (1982); and all recipients of such benefits who have made or will make claims for continued benefits, and whose benefits have been or will be terminated pursuant to the same policies.
>
> The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 19, 1983 and failed to file a complaint in federal district court or to appeal to the next level of administrative review within 60 days after the date of the receipt of such decision.

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In the Supreme Court of the United States

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No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

DAVID DIXON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 785 F.2d 1102. The June 22, 1984 opinion of the district court on respondents' motions for class certification and a preliminary injunction (App., *infra*, 18a-58a) is reported at 589 F. Supp. 1494, and the June 22, 1984 opinion of the district court on the motions by certain individual respondents to intervene (App., *infra*, 59a-67a) is

reported at 589 F. Supp. 1512. The July 26, 1984, order of the district court granting the motions for class certification and a preliminary injunction (App., *infra*, 68a-88a) and the July 22, 1985, order of the district court denying the Secretary's motion to vacate the preliminary injunction (App., *infra*, 89a-91a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1986 (App., *infra*, 16a-17a). By order dated May 27, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 223(d)(1)(A) and (2)(A), 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B); Sections 223(d)(2)(C) and 1614(a)(3)(G) of the Social Security Act, as added by Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800-1801 (codified at 42 U.S.C. (Supp. II) 423(d)(2)(C), 1382c(a)(3)(G)); and 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 are reproduced at App., *infra*, 92a-99a.

STATEMENT

This New York-wide class action involves the validity of regulations under which a claimant for Social Security disability benefits will be found not to be disabled if he does not have a medically "severe"

impairment. The question of the validity of these regulations is already before the Court in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (May 19, 1986).

1. Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability" (42 U.S.C. (Supp. II) 423(a)(1)(D)). Disability benefits also are provided under the Supplemental Security Income program established by Title XVI of the Act (42 U.S.C. (& Supp. II) 1382(a)). The term "disability" is defined under both programs to mean the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A)). The Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. (& Supp. II) 423(d)(2)(A), 1382c(a)(3)(B)).

To implement these statutory definitions, the Secretary has established a five-step "sequential evaluation" process to be followed in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. At step 1, the decision-maker (the state agency, administrative law judge (ALJ), or Appeals Council) determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is found not to be disabled. 20 C.F.R. 404.1520

(b), 416.920(b). If the claimant is not engaged in substantial gainful activity, the decision-maker must determine at step 2 (at issue here) whether the claimant has a medically "severe" impairment. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit" the claimant's physical or mental ability to do "basic work activities" (20 C.F.R. 404.1521(a), 416.921 (a)), which include physical activities such as walking, standing, lifting, etc.; seeing, hearing and speaking; understanding and carrying out simple instructions; using judgment; responding appropriately to supervision and co-workers; and dealing with changes in a routine work setting. 20 C.F.R. 404.1521(b), 416.921(b). If the claimant's impairment does not significantly limit his ability to do basic work activities, he is found not to be disabled on this ground alone, without a specific consideration of his age, education, and work experience. 20 C.F.R. 404.1520 (c), 416.920 (c).[1]

If the claimant does have a "severe" impairment, the decision-maker then must determine at step 3 whether the impairment is so severe as to be the equivalent of one of the listed impairments that are automatically deemed to be disabling. 20 C.F.R. 404.1520(d), 416.920(d). If the impairment is not that severe, the decision-maker then must determine at step 4 whether the claimant is able to do his own

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[1] As we have explained in our certiorari petition in *Yuckert* (at 5 n.1), the sequence in which the severity of an impairment is considered now differs somewhat under the new regulations governing the evaluation of persons who already are receiving disability benefits. However, that difference in sequence does not affect the question whether the absence of a "severe" impairment is by itself sufficient to support a determination that a claimant is not disabled.

past work; if so, he is not disabled. 20 C.F.R. 404.-1520(e), 416.920(e). Finally, if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he can perform other work that exists in the national economy. 20 C.F.R. 404.1520(f), 416.920(f).

2. This class action—which consists of four consolidated suits—was filed on September 23, 1983, in the United States District Court for the Southern District of New York to challenge the "severity" step of the sequential evaluation process. In an opinion dated June 22, 1984, the district court granted respondents' motions for class certification and a preliminary injunction (App., *infra*, 18a-58a).

a. The district court certified a class of all persons in New York who: (i) have filed or will file applications for disability benefits under Title II or Title XVI of the Act and whose applications have been or will be denied on the basis of the severity regulations, or (ii) have received disability benefits that have been or will be terminated pursuant to the same policies (App., *infra*, 55a). But the district court provided that the class "at this time" does not include any persons who received decisions of the Secretary on or before July 19, 1983, and failed to file a complaint in federal district court or to appeal to the next level of administrative review within 60 days (App., *infra*, 70a). The cut-off date of July 19, 1983, which is approximately 60 days before the complaint was filed in this case, was intended to comply with the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision (App., *infra*, 28a & n. 18).

However, the court dispensed with the other prerequisite to suit that ordinarily is applicable under 42 U.S.C. 405(g) by including in the class persons who had not exhausted their administrative remedies and obtained a decision from the Appeals Council on their claims for benefits. The court appeared to acknowledge that respondents' challenge to the "severity" regulations was not collateral to their substantive claims for benefits and that exhaustion of administrative remedies was not futile because benefits might be awarded or denied on some other basis (App., *infra*, 29a-30a & n.19). Nevertheless, the court concluded that exhaustion should not be required because class members would experience financial hardship if they did not receive disability benefits and because the ALJs and the Appeals Council are not free to disregard applicable regulations when adjudicating claims for benefits (*id.* at 30a-31a).

b. The district court determined that a preliminary injunction should be entered because, in its view, the class members would suffer irreparable injury without that relief and were likely to succeed on the merits of their contention that the severity regulations are inconsistent with the Social Security Act. The court read 42 U.S.C. 423(d)(2)(A) and 1382c(a)(3)(B) to require the decision-maker to consider the vocational factors of age, education, and work experience in connection with every claim for benefits, and it therefore held that benefits cannot be denied solely on the basis of the medical severity of the impairment (App., *infra*, 33a-35a). The district court rejected the Secretary's contention that the regulations are a valid means of screening out those claimants who have slight or de minimis impairments. Although it recognized that the Secretary had explained

the regulations on that basis when they were promulgated in 1978 (see 43 Fed. Reg. 9284, 9296), it objected to the fact that "the regulation itself does not use the Secretary's language" (App., *infra*, 36a). The court further recognized that the severity step in the sequential evaluation process was supported by the legislative history of the 1967 amendments to the Social Security Act and that the predecessor regulations had been promulgated in 1968 to implement those amendments. But the court nevertheless believed that the language of 42 U.S.C. 423(d)(2)(A) and 1382c(a)(3)(A) rendered the regulations invalid (App., *infra*, 22a-23a, 39a-42a).[2]

c. On July 25, 1984 the district court entered a broad order that enjoins the Secretary from denying or terminating benefits on the basis of the policies in the challenged regulations and directs retroactive relief for all class members whose benefits already have been denied or terminated on the basis of those policies (App., *infra*, 68a-88a). In particular, the court ordered the Secretary to identify all class members within either 30 days or 75 days; to reopen the administrative decisions denying or terminating ben-

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[2] The district court also invalidated Social Security Ruling (SSR) 82-55, which gave additional guidance to adjudicators regarding the severity step of the sequential evaluation process (App., *infra*, 46a-50a). SSR 82-55 provided, inter alia, that the combined effect of several impairments would not be considered unless each such impairment, considered separately, was severe. See also 20 C.F.R. 404.1522, 416.922 (1984). SSR 82-55 was superseded by statutory amendments, effective December 1, 1984, that require the consideration of the combined effect of several impairments (see page 8 & note 3, *infra*), and SSR 82-55 therefore has been formally rescinded (SSR 85-III-II, at 47 (Apr. 1985)). As a result, this aspect of the district court's decision is not in issue here.

efits to class members and to readjudicate those claims; and to reinstate benefits, as of June 22, 1984, to all class members whose benefits were terminated (*id.* at 71a-74a).

3. In a brief order dated July 22, 1985, the district court denied the Secretary's motion to vacate the preliminary injunction, rejecting the contention that the severity step of the sequential evaluation process was ratified by the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* (App., *infra*, 89a-91a). Section 4 of the 1984 Act requires the Secretary, effective December 1, 1984, to consider the combined effect of impairments in determining whether the claimant's impairments are severe (98 Stat. 1800-1801).[3] The district court acknowledged that Congress approved the sequential evaluation process when it passed the 1984 Act, but it concluded that Congress did not actually validate the severity step itself (App., *infra*, 91a).

4. The court of appeals affirmed the preliminary injunction and the district court's refusal to vacate

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[3] Subsections (a) and (b) of Section 4 of the 1984 Act (98 Stat. 1800) add a new paragraph (C) to Section 223(d) of the Social Security Act (42 U.S.C. (Supp. II) 423(d)(2)) and a new paragraph (G) to Section 1614(a)(3) of that Act (42 U.S.C. (& Supp. II) 1382c(a)(3)). Each paragraph requires the Secretary, when considering whether a claimant's impairment or impairments "are of a sufficient medical severity that [they] could be the basis of eligibility," to "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." Subsection (c) (98 Stat. 1801) provides that these amendments "shall apply with respect to determinations made on or after the first day of the first month beginning after 30 days after the date of the enactment of this Act."

that injunction (App., *infra*, 1a-15a). The court of appeals acknowledged the Secretary's arguments that the challenged regulations "are fully consistent with the Act" and that the district court "should have deferred to the Secretary's longstanding view that medical evidence alone may justify a finding that the claimant is not disabled within the meaning of the Act" (*id.* at 10a). But "[w]hether or not these substantive contentions may prevail on the ultimate decision of the merits of [respondents'] claims," the court stated, the preliminary injunction should not be disturbed because, in its view, the district court did not abuse its discretion in entering the injunction (*id.* at 10a-11a). In a brief discussion that did not mention the origins of the relevant statutory and regulatory provisions, the court of appeals simply stated that the district court had not applied "erroneous legal principles" regarding preliminary injunctions generally (*id.* at 11a-12a). The court also was "not persuaded" (*id.* at 12a) that the legislative history of the 1984 Act rendered the preliminary injunction improper, observing that "in the absence of greater clarity," the district court was not required to conclude that the legislative history constituted a "definitive ratification" of the principle embodied in the severity regulations that benefits may be denied without a specific consideration of the claimant's age, education, and work experience (*id.* at 12a, 14a).

REASONS FOR GRANTING THE PETITION

1. The Court has granted certiorari in *Bowen* v. *Yuckert*, No. 85-1409 (May 19, 1976), to consider the validity of the regulations under which Social Security benefits may be denied if the claimant does not have a medically "severe" impairment. There is no occasion for plenary review of that issue here as

well. The Court therefore should hold the petition in this case and dispose of it as appropriate in light of its decision in *Yuckert*.

2. a. Aside from the erroneous ruling below regarding the validity of the severity regulations, the injunction affirmed by the court of appeals was improper in two other respects:

First, the district court erroneously included in the class and granted relief to numerous claimants who did not exhaust their administrative remedies. As the district court appears to have recognized (App., *infra*, 29a-30a & n.19), respondents' challenge to the validity of the severity regulations is not at all collateral to their claims for benefits; that challenge goes to the very basis of the administrative decisions denying their claims. Moreover, respondents challenge not a "secret" policy, as the Court found in *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 12-13, 17, but a policy embodied in public regulations and elaborated upon in formal Social Security Rulings. Similarly, although the Court sustained the district court's findings in *City of New York* that the class members would suffer a medical setback if they were required to exhaust their administrative remedies, such that the pursuit of administrative remedies would itself affirmatively cause harm (compare *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242, 244 (1980)), in this case the injuries respondents allege are the financial consequences that result from the denial of their claims for benefits on the merits at a preliminary stage of the administrative review process. If those consequences, which Congress must have anticipated, were sufficient to constitute "irreparable injury" that permitted a court to excuse the failure by claimants to pursue their administrative remedies, the exhaustion

requirement under 42 U.S.C. 405(g) would be largely vitiated under the disability and SSI programs.[4]

Second, although the court labeled its order a "preliminary injunction," the relief granted went far beyond "the usual 'prohibitory' injunction which merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, Circuit Justice). The district court, affirmed by the court of appeals, has barred the Secretary from utilizing the severity regulations in adjudicating all disability claims in New York, even though neither court has finally ruled on the validity of the regulations. Indeed the court of appeals relied on the supposedly "preliminary" nature of the relief to avoid addressing the merits of the Secretary's arguments. As a practical matter, that relief is not "preliminary" for the individual claimants affected, because their claims must be adjudicated, and either granted or denied, without reference to the challenged regulations. Cf. *Heckler* v. *Redbud Hospital District*, No. A-32 (July 24, 1985), slip op. 5-6 (Rehnquist, Circuit Justice), motion to vacate denied (Aug. 28, 1985). Moreover, the regulations the Secretary is prohibited from applying rest on a principle—that benefits may be denied on the basis of medical evidence alone, without a specific consideration of the claimant's age, education, and work experience—that has been an integral part of the disability program virtually since

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[4] Congress did not contemplate any such exception from exhaustion requirements for disability or SSI claimants, because it specifically directed that judicial review would be available under both programs in the same manner as was then generally provided in 42 U.S.C. 405(g), which requires a "final decision" as a prerequisite to judicial review. See 42 U.S.C. (& Supp. II) 423(d), 1383(c)(3).

its inception and has been embodied in formal regulations for more than 25 years. See *Yuckert* Pet. 11-16. In addition to this broad prospective relief, the courts below also erred in requiring, incident to a supposedly "preliminary" injunction, the readjudication of the claims of all class members whose benefits were denied in reliance on the severity regulations and the reinstatement of benefits to class members whose benefits were terminated.

b. Although we believe that the court of appeals clearly erred in these additional respects when it affirmed the district court's preliminary injunction, we do not seek review at this time on the issues of exhaustion of administrative remedies and the proper basis and scope of a preliminary injunction in this setting. The retroactive relief ordered by the district court for class members whose benefits were denied or terminated was not stayed, and that relief is now being accomplished.[5] All that then will remain is the prospective effect of the injunction. If the Court sus-

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[5] Independently of the preliminary injunction affirmed by the court of appeals, all class members in this case whose benefits were terminated are entitled under Section 2(d) of the 1984 Act (98 Stat. 1797) to have their claims reopened and readjudicated because they also were members of the certified class in *Schisler* v. *Heckler*, 107 F.R.D. 609 (W.D.N.Y. 1984), aff'd, 787 F.2d 76 (2d Cir. 1986) (petition for rehearing pending), which was an action raising the question whether medical improvement must be shown in order for a claimant's benefits to be terminated. In addition, class members in this case who sought benefits on the basis of a mental impairment have also been affected by the new standards under Section 5 of the 1984 Act (98 Stat. 1801) for evaluating such claims. See *Bowen* v. *City of New York*, slip op. 18 n.14. We have been informed by the Department of Health and Human Services that the claims of class members affected by Sections 2 and 5 of the 1984 Act are now being readjudicated.

tains the validity of the severity regulations in *Yuckert*, the preliminary injunction in the instant case must be reversed on the merits, irrespective of the other errors committed by the court below. On the other hand, if the Court were to hold in *Yuckert* that the severity regulations are invalid, the Secretary of course would follow that ruling in New York, as elsewhere, thereby mooting the other questions regarding the propriety of the preliminary injunction in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (May 19, 1986).

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1985

Docket Nos. 84-6288, -6302, -6304, -6306

Nos. 611, 612, 613, 614

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, EULALIA TEREZ, CARMEN FELICIANO, and TOMASINA GONZALEZ, Individually and on Behalf of All Others Similarly Situated, PLAINTIFFS-APPELLEES

—and—

THE STATE OF NEW YORK AND CESAR PERALES, as Commissioner of the New York State Department of Social Services, PLAINTIFFS-INTERVENORS-APPELLEES

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

Argued: December 18, 1985 Decided: Mar. 7, 1986

Before: OAKES, KEARSE, and PIERCE, *Circuit Judges.*

KEARSE, *Circuit Judge*:

The Secretary of Health and Human Services ("Secretary") appeals from orders of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, granting and refusing to vacate a preliminary injunction that, *inter alia*, forbids the Secretary to deny or terminate disability benefits on the basis of 20 C.F.R. §§ 404.1520(c), 404.1521, 416.920(c), and 416.921 (1984), the so-called "severity regulations" used by the Secretary in evalauting claims for disability benefits under the Social Security Disability Insurance program established by Title II of the Social Security Act, as amended (the "Act"), 42 U.S.C. 401 *et seq.* (1982), and the Supplemental Security Income program established by Title XVI of the Act, as amended, 42 U.S.C. § 1381 *et seq.* (1982). In an opinion reported at 589 F. Supp. 1494 (1984), the court granted the preliminary injunction after finding that plaintiffs had demonstrated a likelihood of success on the merits of their claim that the severity regulations violate the Act. The court denied the Secretary's subsequent motion to vacate the preliminary injunction, rejecting the contention that amendments to the Act enacted after entry of the preliminary injunction constituted a legislative ratification of the severity regulations. On appeal, the Secretary contends that the injunction is improper because the regulations are consistent with the Act and because the court failed to give sufficient deference to the Secretary's longstanding interpretation of the Act. We conclude that the granting of the injunction was not an abuse of the court's discretion and we therefore affirm.

BACKGROUND

In determining the eligibility of applicants for disability benefits under Title II or Title XVI of the Act, the Secretary uses a five-step sequential evaluation process, of which the severity regulations are a part. Under this process, only certain types of evidence are considered at each step of the evaluation. At issue in the present case is step 2; a failure to meet the disability criteria set by step 2 results in a denial of benefits without proceeding to any later step. In *City of New York v. Heckler*, 742 F.2d 729, 732 (2d Cir. 1984), *cert. granted*, 106 S. Ct. 57 (1985), we described the process as follows:

> The first step in the sequential process is a decision whether the claimant is engaged in "substantial gainful activity." If so, benefits are denied. 20 C.F.R. §§ 404.1520(a), (b), 416.920 (a), (b) (1983). If not, the second step is a decision whether the claimant's medical condition or impairment is "severe." If not, benefits are denied. 20 C.F.R. §§ 404.1520(c), 416.920 (c). If the impairment is "severe," the third step is a decision whether the claimant's impairments meet or equal the "Listing of Impairments" set forth in subpart P, app. 1, of the social security regulations, 20 C.F.R. §§ 404.1520 (d), 416.920(d). These are impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the "listed" impairments, he or she is conclusively presumed to be disabled and entitled to benefits. If the cliamant's impairments do not satisfy the "Listing of Impairments," the fourth step is assess-

> ment of the individual's "residual functional capacity," *i.e.*, his capacity to engage in basic work activities, and a decision whether the claimant's residual functional capacity permits him to engage in his prior work. If the residual functional capacity is consistent with prior employment, benefits are denied. 20 C.F.R. §§ 404.1520 (d), 416.920(e). If not, the fifth and final step is a decision whether a claimant, in light of his residual functional capacity, age, education, and work experience, has the capacity to perform "alternative occupations available in the national economy." *Decker v. Harris*, 647 F.2d 291, 298 (2d Cir. 1981); 20 C.F.R. §§ 404.1520(f), 416.920(f). If not, benefits are awarded.

At the times pertinent to the proceedings below, step 2 of the sequential process was set forth in the Secretary's regulations as follows:

> *You must have a severe impairment.* If you do not have any impairment(s) which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. §§ 404.1520(c), 416.920(c) (1984).

The plaintiffs in these actions, which have been consolidated for appeal, are persons whose applications for disability benefits were denied by the Secretary at the second step of the evaluation process on the ground that the medical evidence alone as to any single impairment, without regard to the claimants' age, education, employment experience, ability to return to prior work, or other vocational factors,

failed to establish the existence of an impairment that significantly limited their ability to perform basic work activities. To the extent pertinent here, the plaintiff class consists of persons in the State of New York who have been or will be denied disability benefits under Title II or Title XVI of the Act or who have had or will have such benefits terminated on the basis of the severity regulations. Plaintiffs contend, *inter alia*, that the Act requires consideration of vocational factors such as age, education, and work experience, before an applicant may be found not disabled, and that Step 2 of the Secretary's process is therefore inconsistent with the Act. They also contend that the Secretary is required to consider their impairments in combination and is not to require that a single impairment be sufficiently severe to constitute a disability without consideration of their other impairments.

A. *The Granting of the Preliminary Injunction*

Following the commencement of the litigation, plaintiffs moved for a preliminary injunction

> (1) prohibiting the Secretary from denying or terminating Social Security or SSI benefits due to the asserted non-severity of the claimant's impairments; (2) directing the Secretary to restore benefits to all members of the proposed class who (a) received decisions, finding them no longer eligible for benefits that were rendered at any stage of the administrative process, on July 20, 1983 or thereafter, or (b) had pending challenges to such decisions on July 20, 1983; and (3) directing the Secretary to reopen the applications of all class members whose applications for benefits have been denied by the Sec-

> retary, at any stage of the administrative process, since July 20, 1983, and to redetermine these applications without reference to the threshold severity test.

589 F. Supp. at 1501. Applying only the more exacting branch of this Circuit's standard for the granting of preliminary injunctive relief, *see Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam) (moving party must show, in addition to irreparable injury, either (a) likelihood of success on the merits, or (b) fair ground for litigation plus a balance of hardships tipping decidedly in his favor), the court granted the motion on the ground that plaintiffs had established a likelihood of success on the merits of their claims and had shown that they would suffer irreparable harm in the absence of preliminary injunctive relief. In considering plaintiffs' likelihood of succeeding on the merits of their claims, the court noted that the scope of its review, in light of the Secretary's authority to establish regulations implementing the disability provisions of the Act, was limited to a determination of whether the regulations that had been promulgated " 'exceeded the Secretary's statutory authority and whether they [were] arbitrary and capricious.' " 589 F. Supp. at 1502 (quoting *Heckler v. Campbell*, 461 U.S. 458, 466 (1983)).

The court began by looking at the language of the definition of disability found in 42 U.S.C. §§ 423(d) and 1382c(a)(3). Sections 423(d)(1)(A) and 1382c (a)(3)(A) define "disability" as the inability

> to engage in any substantial gainful activity by reason of any medically determinable physical or

> mental impairment which can be expected to result in the death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . .

Sections 423(d)(2)(A) and 1382c(a)(3)(B) go on to state that "[f]or purposes of" this definition, a person will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work . . . .

Reading the two subsections together, the court concluded that the statute appears to require that a claimant's age, education, and work experience be considered in determining whether or not he is disabled. The court noted that on at least two occasions this Court had reserved decision on the question of the validity of the severity regulations, *see Keith v. Heckler*, 732 F.2d 1089, 1094 (2d Cir. 1984), and *Chico v. Schweiker*, 710 F.2d 947, 953 (2d Cir. 1983), and that in *Chico* we had noted "a seeming conflict between the letter of § 423(d)(2)(A), on the one hand, and, on the other, the Secretary's understandable desire to supply . . . some threshold that a claimant must pass before the Social Security Administration is required either to apply the Appendix 2 guidelines or to call vocational experts," 710 F.2d at 953. The district court concluded that since the statute speaks of "an impairment (or impairments) which is '*of such severity that*' the claimant cannot, 'considering his age, education and work experience,' perform any substantial gainful work," 589 F. Supp.

at 1502 (emphasis in opinion), the Secretary had separated two aspects of the disability inquiry that were intertwined in the statute, and that step 2 of the severity regulations foreclosed consideration of one aspect that the statutory definition required to be taken into account.

The court rejected the Secretary's contention that her interpretation of the statute reflected Congress' true intent, noting that in other sections of the statute, such as 42 U.S.C. § 423(d)(2)(B), Congress's intent to permit the denial of benefits without consideration of vocational characteristics had been expressed unambiguously. It also rejected the contention that the severity regulations merely serve to screen out claims in which the impairment is plainly de minimis, finding that that contention was inconsistent with the language of the regulations. The court further noted that although the severity regulations speak of the claimant's ability to perform basic work-related activities, the Secretary means by this such activities as walking, standing, sitting, lifting, following instructions, and responding appropriately to coworkers and supervisors, *see* 20 C.F.R. § 404.1521(b), and that the term "basic" work-related activities is not used to refer to the claimant's vocational characteristics.

In sum, the court concluded that plaintiffs would likely establish that the severity regulations were inconsistent with the definition of disability enacted by Congress and that the authority of the Secretary thus to interpret the statute did not extend so far.

B. *The Denial of the Motion to Vacate*

Some two months after the granting of plaintiffs' motion for a preliminary injunction, Congress passed

the Social Security Disability Benefits Reform Act of 1984 (the "Reform Act"), Pub. L. No. 98-460, 98 Stat. 1794. The Secretary, who had filed notices of appeal from the order granting the preliminary injunction, withdrew those appeals without prejudice to their reinstatement and moved for an order vacating so much of the preliminary injunction as, *inter alia*, enjoined use of the severity regulations, on the ground that the Reform Act's addition of a new subparagraph (C) to 42 U.S.C. § 423(d)(2), together with Congress's failure explicitly to repeal the severity regulations, constituted a legislative ratification of the severity regulations. The new provision relied on reads as follows:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

Pub. L. No. 98-460, § 4(a)(1), 98 Stat. 1800.

The court denied the Secretary's motion, noting evidence that Congress had deliberately declined to express support for the severity regulations and concluding that the new provision was intended simply to eliminate the Secretary's practice of refusing to consider impairments in combination:

> "The language of the new subsection added by the 1984 Act does no more than require that the Secretary discontinue her policy of refusing to consider the combined effect of non-severe impairments. Furthermore, the Conference Committee rejected the language of the Senate Finance Committee Report which expressed some support for the Secretary's severity policies. While the Conference Committee Report endorses the Secretary's sequential evaluation process, it does not validate the severity test used by the Secretary."

Decision dated July 22, 1985 (quoting *McDonald v. Heckler*, 612 F. Supp. 293, 297 (D. Mass. 1985)).

The Secretary appealed from the denial of its motion to vacate and reinstated its prior appeals from the order granting the preliminary injunction. All of the appeals have been consolidated herein.

II. DISCUSSION

On appeal, the Secretary argues principally that the district court's grant of preliminary injunctive relief was improper because the severity regulations are fully consistent with the Act and because, in any event, the court should have deferred to the Secretary's longstanding view that medical evidence alone may justify a finding that the claimant is not disabled within the meaning of the Act. Whether or not these substantive contentions may prevail on the ultimate decision of the merits of plaintiffs' claims, we are unpersuaded that the preliminary injunction should be disturbed.

The proper standard for appellate review of an order of the district court granting a preliminary in-

junction is whether or not the order constituted an abuse of judicial discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979). Such an abuse of discretion may take the form of the application of erroneous legal principles, or error in findings of fact, or error in the substance or form of the injunction. *E.g., Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 315 (2d Cir. 1982). We are unpersuaded that the district court abused its discretion in granting preliminary injunctive relief.

First, we note that the Secretary does not contend that the court erred with respect to any finding of fact, or with respect to the issue of irreparable injury, or with respect to the form of the injunction. Her contentions are, rather, that the court failed to give sufficient deference to the Secretary's interpretation of the Act and adoption of regulations to implement the Act as thus interpreted. We find in these contentions no ground for reversal of the preliminary injunction. It is clear that the court recognized the applicable legal principle that substantial deference must be given to the Secretary's views. It noted that its task was limited to a determination of whether the Secretary had exceeded her statutory authority and whether the regulations were arbitrary and capricious. It thus appears that the court made its decision within the proper legal framework.

Nor do we find an abuse of discretion in the court's comparison of the regulations with the Act in light of the Secretary's considerable discretion. The conclusion the court reached as to the likelihood that the two are in conflict does not bespeak any application of erroneous legal principles. This Court itself

has noted the apparent conflict between the statutory language and the severity regulations, *see Chico v. Schweiker*, 710 F.2d at 953, and we have, as the district court noted, twice reserved for another day the question of whether the severity regulations violate the Act.

Further, we are not persuaded that the legislative history of the Reform Act should have been viewed by the district court as a clear ratification of the severity regulations. As the district court's opinion noted, there was some support in the Senate Finance Committee's report for the Secretary's severity policies. That report stated that the Committee's proposed amendment of the Act, to require the Secretary to consider the combined effect of all of the individual's impairments, was not intended to change the existing sequential evaluation process and would "require[] the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe. If they are not, the claim must be disallowed." S. Rep. No. 466, 98th Cong., 2d Sess. 22 (1984). There was equally, however an indication that the House of Representatives did not approve of a total disregard of vocational factors at step 2. Thus, the report of the House of Representatives Ways and Means Committee stated as follows:

> The current "sequential evaluation process" allows such a determination [that impairments are slight enough to warrant a presumption that work ability is not seriously affected], and the committee does not wish to eliminate or seriously impair use of that process. However, the committee notes that the Secretary has already

> planned to re-evaluate the current criteria for non-severe impairments, *and urges that all due consideration be given to revising those criteria to reflect the real impact of impairments upon the ability to work.*

H.R. Rep. No. 618, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3038, 3045 (emphasis added). Neither the Senate's view nor the House of Representatives' views was incorporated into the Conference Committee's report. Rather, that report stated as follow:

> The conferees also believe that in the interests of reasonable administrative flexibility and efficiency, a determination that an individual is not disabled may be based on judgment that an individual has no impairment, or that the medical severity of his impairment or combination of impairments is slight enough to warrant a presumption, even without a *full* evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current "sequential evaluation process" allows such a determination and the conferees do not intend to either eliminate or impair the use of that process. The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for nonsevere impairments and expect that the Secretary will report to the Committes on the results of this evaluation.

H.R. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3080, 3088 (emphasis added). Precisely what was meant by the apparent endorsement of findings of no disability without a "full" evaluation of vocational fac-

tors is not clear. The implication would appear to be that the conferees would endorse some consideration of those factors at step 2 of the evaluation process. In any event, in the absence of greater clarity, the district court was hardly required to conclude that the legislative history constituted a definitive ratification of step 2's apparently complete disregard of vocational factors.

In all the circumstances, we are not prepared to say that the district court was wrong to find that plaintiffs had established a likelihood of success on their claims or that it abused its discretion in granting preliminary injunctive relief.

Having thus concluded that the preliminary injunction should not be overturned, we are nonetheless constrained to note that the Reform Act is not entirely without effect in this case. As noted by the district court, the Reform Act's addition of § 423(d)(2)(C) now expressly requires that the Secretary give consideration to the combined effect of impairments that individually may be nonsevere. Several of the plaintiffs in these actions had claimed disability on the basis of a number of impairments that the Secretary refused to consider in combination. The district court noted such denials as to three of the four named plaintiffs in the *Dixon* action; the particulars of the claims of the plaintiffs in the other actions were not discussed.

The import of the Reform Act thus may well be that the evaluation of the claims of most of the class representatives will be extended beyond step 2 of the sequential evaluation process because of the severity of their impairments viewed in combination, without regard to the validity *vel non* of step 2 of the severity regulations. The Secretary does not appear to have

moved for reconsideration of the preliminary injunction on this basis, however, and we thus decline to overturn the injunction on this basis. We do note, however, that, given the prudential concern for adjudicating challenges to agency determinations without unnecessarily reaching such global questions as the validity of promulgated regulations, this aspect of the Reform Act may well have implications for the eventual determination of the case on its merits, for the relief ultimately to be granted, for the definition of the class of plaintiffs attacking the severity regulations, and for the appropriateness of the present named plaintiffs to represent the certified class. None of these questions, however, is now before this Court.

CONCLUSION

The orders of the district court granting and refusing to vacate the preliminary injunction are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of March one thousand nine hundred and eighty-six.

Docket Nos. 84-6288, -6302, -6304, -6306

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, EULALIA TEREZ, CARMEN FELICIANO, and TOMASINA GONZALEZ, Individually and on Behalf of All Others Similarly Situated, PLAINTIFFS-APPELLEES

—and—

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services, PLAINTIFFS-INTERVENORS, APPELLEES

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed Mar. 7, 1986]

MANDATE

Present: HON. JAMES L. OAKES,
HON. AMALYA L. KEARSE,
HON. LAWRENCE W. PIERCE,
Circuit Judges,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith
Clerk

/s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 83 Civ. 7001 (MEL)

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

No. 83 Civ. 8264 (MEL)

EULALIA TEREZ, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

No. 83 Civ. 8609 (MEL)

CARMEN FELICIANO, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

No. 84 Civ. 110 (MEL)

TOMASINA GONZALEZ, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

June 22, 1984

LASKER, District Judge.

I.

These cases present a question whose determination has twice been reserved by the Court of Appeals for this Circuit:[1] whether the denial of federal disability claims under the so-called "severity regulation" adopted by the Secretary of Health and Human Services (the "Secretary") violates the Social Security Act (the "Act") because the regulation conflicts with the definition of "disability" contained in the Act. Under the regulation,[2] claims for disability benefits under the Supplemental Security Income ("SSI") or Old Age Survivors and Disability Insurance ("OASDI") programs are denied without regard to the claimant's age, education, employment experience, ability to return to prior work, or other

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[1] *Keith v. Heckler*, 732 F.2d 1089 at 1093-1094 (2d Cir. 1984); *Chico v. Schweiker*, 710 F.2d 947, 952-53 (2d Cir. 1983).

[2] 20 C.F.R. §§ 404.1520(c), 416.920(c) (1983).

vocational factors, if the claimant's impairment is judged to be "not severe" based on medical criteria alone. In recent weeks, two judges of this Court, ruling on individual Social Security appeals, have reversed the Secretary's denial of benefits under the severity regulation, holding that the severity regulation conflicts with the statutory definition of disability and is invalid.[3] In the instant cases, the individual plaintiffs, on behalf of themselves and all other similarly situated, together with the State of New York and the Commissioner of the New York State Department of Social Services, seek declaratory and injunctive relief against the Secretary's use of the severity regulation in valuating disability claims, and against her policy of refusing to consider the combined effects of impairments found to be "non-severe." [4]

Jurisdiction is alleged under 42 U.S.C. §§ 405(g) and 1383(c)(3), which provide for judicial review of the Secretary's decisions as to disability benefits; 28 U.S.C. § 1331 (federal question jurisdiction), and

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[3] *Glover v. Heckler,* 588 F.Supp. 956 (S.D.N.Y. 1984); *Boiano v. Heckler,* 586 F.Supp. 732 (S.D.N.Y. 1984). The regulation was also held invalid in a decision in the Eastern District of California which granted class certification and preliminary injunction motions. *Smith v. Heckler,* Civ. No. S-83-1609, slip op., (E.D. Cal., June 6, 1984). The opinion was brought to our attention immediately prior to the issuance of this memorandum.

[4] Plaintiffs also contend that the Secretary adopted the severity regulation without prior notice and opportunity for public comment, as required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 and that the Secretary's failure to establish ascertainable standards for determining whether an impairment is "severe" violates their constitutional right to due process.

28 U.S.C. § 1361 (mandamus jurisdiction).[5] This memorandum addresses plaintiffs' motion for class certification and for a preliminary injunction. In a separate memorandum issued this date, motions to intervene by the State of New York, the Commissioner of the New York State Department of Social Services, and claimants Ricardo Ramirez, Ophelia Casey, Dominga Carrasquillo, and Joanne Lockett have been granted.

A. Statutory and Regulatory Background

The OASDI and SSI programs provide for the payment of benefits to disabled persons. Under both programs, a person is considered disabled if he or she is unable

> "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . ." [6]

The Act provides that "for purposes of" applying this definition, an individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience,

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[5] In view of our conclusions in this decision as to the existence of jurisdiction under section 405(g) and 1383(c)(3), we need not address the parties' arguments as to the other sources of jurisdiction asserted by plaintiffs.

[6] 42 U.S.C. §§ 423(d)(1)(A) & 1382c(a)(3)(A).

> engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work . . . ." [7]

The Secretary is authorized to establish rules and regulations, consistent with the Act, governing the determination of disability claims.[8]

Before 1978, the Secretary's regulations [9] set forth a general discussion of the factors to be applied in evaluating disability claims. In pertinent part, it was stated that disability

> "is determined from all the facts of [the] case. Primary consideration is given to the severity of the individual's impairment. Consideration is also given to such other factors as the individual's age, education, and work experience. Medical considerations alone can justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities. On the other hand, medical considerations alone . . . can, except where other evidence rebuts a finding of 'disability' . . . justify a finding that the individual is under a disability where his im-

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[7] 42 U.S.C. §§ 423(d)(2)(A) & 1382c(a)(3)(B).

[8] 42 U.S.C. §§ 405(a) & 1383(d)(1).

[9] This opinion uses the word "Secretary" to refer both to the current Secretary and her predecessors, as the context may require.

pairment . . . is listed in the appendix to the subpart. . . ." [10]

In 1978 the Secretary revised the regulations, establishing a five-step sequential procedure for determining whether a claimant is disabled.[11] These regulations were modified again in 1980, primarily to make their language clearer.

Under the existing regulations, if the claimant is found not to be disabled under any one of the sequential tests, the analysis ends and the remaining steps of the analysis are not completed. As the first step, the Secretary ascertains whether the claimant is working; if so, a finding of "not disabled" follows. Next (step 2), the Secretary determines, solely on the basis of medical factors, whether the claimant has a "severe" impairment which "significantly limits [his] physical or mental ability to do basic work activities." The regulation specifically provides that at this step the Secretary "will not consider your age, education, and work experience." [12] If the claimant

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[10] 20 C.F.R. § 404.1520(a) (1968).

[11] 20 C.F.R. §§ 404.1520, 416.920 (1983).

[12] 20 C.F.R. §§ 404.1520(c), 416.920(c) (1983). The regulation defines "basic work activities to include:

"(1) Physical functions such as walking, standing sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment.

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting."

§ 404.1521(b); 416.921(b).

is determined to have a "severe" impairment under this definition, the Secretary next considers (step 3) whether the impairment is one which is listed in Appendix 1 of the regulations; if so, the claimant is found to be disabled without requirement of further proof that the impairment prevents him from working. The fourth step comes into play if the claimant's impairment, though deemed "severe" under step 2, is not a "listed" impairment under step 3. In such cases, the Secretary determines whether, despite the claimant's impairment, he is able to perform his past work. If not, the Secretary determines (step 5) whether, considering the claimant's age, education, and work experience, his impairment prevents him from doing any other work available in the national economy. If the claimant cannot, he is found to be disabled.[13] In addition to these regulations, the Secretary issued a Social Security Ruling in 1982 (SSR 82-55) which instructs Social Security administrators not to consider the combined effects of impairments which do not individually meet the Secretary's "severity" standard. Accordingly, someone who suffers several impairments deemed nonsevere will be denied benefits regardless of their combined effect. SSR 82-55 also lists 20 specific impairments which the Secretary has determined are non-severe *per se*. Moreover, the ruling is binding on all Social Security Administration personnel, including administrative law judges and the Appeals Council, and was made effective retroactively to August 20, 1980.

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[13] *See generally Chico v. Schweiker*, 710 F.2d 947 (2d Cir. 1983).

B.

The named plaintiffs were found "not disabled" under the severity regulation (the second step of the Secretary's sequential evaluation), and thus were denied benefits on the grounds that the medical evidence alone failed to establish the existence of an impairment which significantly limited their ability to perform basic work activities. A description of the cases of some of the named plaintiffs illustrates the operation of the Secretary's policies.

David Dixon suffers pain in his right hip from a serious fracture which he sustained in an automobile accident in 1969, and attends the Harlem Rehabilitation Center as an outpaient for six hours a day, five days a week. He is blind in one eye, (also as a result of the automobile accident) suffers from a personality disorder, and has a verbal I.Q. at 68. The Administrative Law Judge ("ALJ") found each of Dixon's impairments to be non-severe under the second step of the five-step disability analysis. As to the hip fracture, The ALJ found that if Dixon underwent "intensive therapy" he would "possibly enhance [sic] his current disability." Dixon's blindness in one eye was found not to be a severe impairment because he retained essentially normal sight in his other eye. As to Dixon's mental capacity and psychological problems, the ALJ stated that there was "a good possibility" that these problems would not prevent Dixon from working if he obtained "retraining and some program to help [him] with his motivation." Because the ALJ considered each impairment not to be severe based on the medical evidence, he did not consider (and, under the regulation, was not free to consider) whether Dixon was able to return to his last job (which had ended in 1974), or whether in view

of Dixon's impairments and his age, education, and work experience, he was capable of performing any job in the national economy. There is no indication that the ALJ considered the combined effect of Dixon's impairments. The Appeals Council affirmed.[14]

Joanne Lockett worked as an operator and supervisor for the telephone company for twenty years, until she suffered an acute onset of brain stem syndrome in October 1981. She has suffered, as the ALJ found, "severe neurological and psychological impairments" as a result, manifested in particular by substantial difficulty with memory. The ALJ found that Lockett was unable to return to her prior job, and that she was disabled from October 1981 to December 1982. However, he decided that she was no longer disabled as of December 1982 because at that time she began participating in a sheltered workshop at the Federation for the Handicapped. In the ALJ's view, this participation meant that

> "her condition was no longer severe, in that it no longer significantly limited her ability to engage in basic work activities or work related functions, in terms of an ordinary work day on a regular and continuing day-to-day basic [sic] in the competitive job market."

He held that, in view of this finding as to non-severity for the period beginning in December 1982, "it is not material whether the claimant was then able to sustain any of her past relevant work or any other work which exists in significant numbers in the national economy." [15] Her administrative appeal is pending.

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[14] *See* Transcript of Proceedings, pp. 3, 7-16.

[15] *See* Hearing Decision, Exhibit C to Affidavit of Nancy Morawetz, dated January 26, 1984 ("Morawetz Affidavit").

Dominga Carrasquillo's impairments of hypertension, arthritis, chest pain, and pain in her lower extremities were all found to be non-severe in a very brief decision by the ALJ who presided at her hearing. Her impairments were not considered in combination. Carrasquillo was 59 years old at the time of her hearing, has a third grade education, is illiterate in English, and last worked in 1975 as a buttonhole maker in a factory. None of these factors was considered, however, because the ALJ found that her impairments did not meet the "severity" threshold on the basis of medical evidence alone.[16] Carrasquillo's administrative appeal is pending.

Ricardo Ramirez has suffered injuries to his back in two separate accidents, one in 1961 and one in 1979, and, as the ALJ found, "has a chronic lower back pain syndrome with degenerative changes at L5-S1 levels." His bending and straight leg lifting are limited to 30 and 20 degrees, respectively. Ramirez is also completely bind in his right eye. The ALJ found that Ramirez' impairments did not meet the severity requirement. Accordingly, the ALJ failed to perform any vocational analysis, noting specifically that under the regulations

> "medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe without consideration of the vocational factors."

The ALJ did not consider the combined effect of Ramirez' impairments. Ramirez was 54 years old

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[16] *See* Hearing Decision, ex. D. to Morawetz Affidavit.

at the time of the hearing, with a high school education, and has not worked since his last accident.[17] The Appeals Council affirmed.

II. Motion for Preliminary Injunction

A.

Preliminary relief is sought by those members of the proposed class whose benefits were terminated pursuant to the policies challenged in this action on or since July 20, 1983, at any stage of the administrative process, or who had challenges to such decisions pending on July 20, 1983. Because the complaint was filed on September 23, 1983, these class members all meet the Act's statute of limitations requiring that actions for judicial review of the Secretary's decision be filed within 60 days of the date of the decision.[18] However, the sub-class seeking preliminary relief includes claimants whose appeals before the Appeals Council were still pending and who therefore have not yet exhausted administrative remedies. Accordingly, we must consider the Secretary's argument that the Court is without jurisdiction over those claimants who have not yet exhausted their administrative remedies as required by Section 405(g).

As is often noted, the requirement of exhaustion of administrative remedies has a "waivable" and a "non-waivable" element. The non-waivable element requires that a plaintiff present his claim in some form

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[17] *See* Hearing Decision, Ex. I to Morawetz Affidavit.

[18] 42 U.S.C. §§ 405(g), 1383(c). The class actually includes claimants who received final decisions within 65 days of the filing of the complaint, because the regulation assumes that the decision is received within 5 days of its mailing.

to the Secretary. Full exhaustion of administrative remedies is, however, a "waivable" element. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). The non-waivable requirement has been satisfied here. All of the plaintiffs who move for preliminary relief have presented their claims, which have, in all cases, either been denied or terminated at some level of the administrative process. The Secretary's argument is directed to the requirement of full exhaustion, which may be waived by a court under certain circumstances:

> "A waiver of the exhaustion requirement may be inferred where the plaintiffs' legal claims are collateral to their demand for benefits, where exhaustion would be a *pro forma* or futile gesture, or where the harm suffered in the interim would be irreparable in the sense that no *post hoc* relief would be adequate."

Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983), *citing Mathews v. Eldridge*, 424 U.S. at 330-31, 96 S.Ct. at 895-896.

The Secretary contends that, under the analysis employed in *Smith*, plaintiffs do not satisfy the collaterality and futility grounds for waiver of exhaustion.[19] Even if the Secretary were correct as to those

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[19] *Smith* held that a class-action challenge to the Secretary's practice of terminating disability benefits without a finding of medical improvement did not raise an issue which was collateral to plaintiffs' demand for benefits, since the plaintiffs there were not "asserting a right to a particular kind of procedure" (as was true in *Eldridge*) but were claiming "only that, depending on the evidence adduced, an illegal termination of their benefits may result from the application of the Secre-

grounds, however, we believe that waiver of exhaustion is appropriate because plaintiffs have demonstrated that they will suffer irreparable harm for which *post hoc* relief would be inadequate. Unlike the *Smith* plaintiffs, who were all receiving disability benefits at the time of the lawsuit, none of the named plaintiffs in this case are receiving benefits. As their affidavits demonstrate, without benefits their respective financial situations are precarious.

Moreover, neither the ALJs nor the Appeals Council, of course, have the authority to declare the Secretary's severity standard unlawful, but instead are required to apply that standard (along with SSR 82-55) to each claim. In such circumstances, to require plaintiffs to pursue a process which will be guided by a procedure they claim is illegal, and which has already resulted in an initial denial of benefits, on the possibility that the claim will ultimately be disposed of on some other basis, is unwarranted, particularly since the legal issue raised here is not one which is likely to "benefit from further factual development and refinement through the administrative process." *Heckler v. Lopez*, —— U.S. ——, 104 S.Ct. 10, 15, 77 L.Ed.2d 1431 (1983) (Rehnquist, J.) *application to vacate stay denied*, —— U.S. ——, 104 S.Ct. 221, 78 L.Ed.2d 217 (1983); *cf. Smith*, *supra*, 709 F.2d at 780-81 (legal issue raised by plaintiffs

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tary's test for current disability." *Smith v. Schweiker*, 709 F.2d at 780. *Smith* also held that exhaustion could not be deemed futile because the plaintiffs' claims for benefits might be denied or granted on other grounds at other stages of the administrative process. The decision noted that the benefits of every named plaintiff and intervenor had actually been restored as a result of the administrative appeal process. *Id.*

was "unformulated" and was not presented "in the context of a concrete case").[20]

B. Standard for Preliminary Relief

Plaintiffs seek a preliminary injunction

> (1) prohibiting the Secretary from denying or terminating Social Security or SSI benefits due to the asserted non-severity of the claimant's impairments; (2) directing the Secretary to restore benefits to all members of the proposed class who (a) received decisions, finding them no longer eligible for benefits that were rendered at any stage of the administrative process, on July 20, 1983 or thereafter, or (b) had pending challenges to such decisions on July 20, 1983; and (3) directing the Secretary to reopen the applications of all class members whose applications for benefits have been denied by the Secretary, at any stage of the administrative process, since July 20, 1983, and to redetermine these applications without reference to the threshold severity test.

To obtain such relief, a plaintiff must ordinarily demonstrate irreparable harm, and either a likelihood of success on the merits or the existence of a fair ground for litigation, with the balance of hardships decidedly in his favor. *Jackson Dairy, Inc. v. H.P. Hood &*

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[20] The facts of this case are also clearly distinguishable from those in *Heckler v. Ringer*, —— U.S. ——, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), where waiver of exhaustion was denied in part because individuals asserting claims similar to those presented by the *Ringer* plaintiffs were routinely receiving favorable decisions from the ALJs. *Id.* —— U.S. at ——, 104 S.Ct. at 2023. Here, plaintiffs have all received unfavorable ALJ decisions.

Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

The Secretary, however, argues that on this motion the plaintiffs must show a likelihood of success (not merely a fair ground for litigation) because the issuance of an injunction will burden the Social Security Administration and cause harm to the public interest. The Secretary relies, *inter alia*, upon *Union Carbide Agricultural Products v. Costle*, 632 F.2d 1014, 1018 (2d Cir.1980), *cert denied*, 450 U.S. 996, 101 S.Ct. 1698, 68 L.Ed.2d 196 (1981), which states

> "When Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order."

Plaintiffs argue, however, that Congress has not authorized the use of a severity standard in isolation from vocational factors, and that it is in the public interest that the disability program be administered as Congress intended. We believe in litigation such as this no party has an exclusive claim of the public interest, and accordingly we doubt the appropriateness of applying the doctrine of *Union Carbide*. In any event, the question is not dispositive, because, as discussed below, we conclude that plaintiffs have in fact established a likelihood of success on the merits.

C. The Severity Regulation

As noted previously, the question of the lawfulness of the Secretary's severity regulation has been specifically reserved by the Second Circuit on at least two occasions. *See Keith v. Heckler*, 732 F.2d 1089 at 1093-94 (2d Cir.1984); *Chico v. Schweiker*, 710

F.2d 947 (2d Cir.1983). In *Chico*, Judge Friendly noted

> "the close question of the validity of the 'severity" regulation, involving as it does a seeming conflict between the letter of § 423(d)(2)(A), on the one hand, and, on the other, the Secretary's understandable desire to supply . . . some threshold that a claimant must pass before the Social Security Administration is required either to apply the Appendix 2 guidelines or to call vocational experts, and the Supreme Court's recognition, reaffirmed in its recent decision in [*Heckler v.*] *Campbell*, that Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act,' *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 [101 S.Ct. 2633, 2640, 69 L.Ed.2d 460] (1981)."

710 F.2d at 953.

In view of the Secretary's authority to establish regulations implementing the disability provisions of the Act, our review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983). The starting point for this analysis, as *Chico* points out, is the language of the statutory definition of "disability". A "disability" is a

> "physical or mental impairment or impairments . . . of such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education and work experi-

> ence, engage in any kind of substantial gainful work which exists in the national economy."

§§ 423(d)(2)(A), 1382c(a)(3)(B).

In "implementing" this definition, the Secretary has separated the inquiry as to the severity of the impairment from the inquiry as to the combined effect of a claimant's impairments and his age, education, and work experience on his ability to engage in substantial gainful work. As the severity regulation states, the claimant must first establish, based on medical factors alone, that his impairment is severe —that is, that it significantly limits his ability to perform "basic work-related activities"—and at this stage of the analysis the SSA "will not consider your age, education, and work experience." The plaintiffs argue that this requirement is flatly inconsistent with the statutory definition, which, they contend, requires that the severity of an impairment be evaluated in terms of the combined effect of the impairment and the claimant's age, education and work experience. The Secretary argues that the statute should be read to establish three independent requirements—that a claimant have a severe impairment, that he be unable to return to his prior employment, and that his impairment prevent him, in light of his age, education, and work experience, from performing any other substantial work.

In our view, the Secretary's interpretation, which at first glance may appear merely to have arranged the factors mentioned in the statute in an orderly fashion, has resulted instead in a substantive rewriting of the statute. The statute speaks of an impairment (or impairments) which is "*of such severity that*" the claimant cannot, "considering his age, edu-

cation and work experience," perform any substantial gainful work. Under the severity regulation, by contrast, the Secretary had found that plaintiffs do not have severe impairments, and therefore are not disabled, *without* considering whether their impairments, in light of their age, education, and work experience, permit them to perform gainful work. This result is simply contrary to the statutory definition.

The Secretary argues, however, that it is clearly within her authority to establish a threshold of medical severity which a claimant must demonstrate before the Secretary is required to carry out a full vocational analysis of the claimant and of his ability to obtain a job available in the national economy. The Secretary points out that such a threshold showing was required in the prior regulations, under which a claim could be denied on medical grounds alone if the claimant had only a "slight" impairment, defined as a "slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities."[21] According to the Secretary, the 1978 regulations were not intended to effect a substantive change in the level of severity that must be shown before vocational factors will be considered, but rather to clarify the circumstances under which a finding of not disabled could be justified on the basis of medical considerations alone. As the Secretary stated in 1978 in the commentary accompanying the proposed regulations:

> "there is a point in the range of impairment severity below which the effects of the impairment(s) have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective

[21] 20 C.F.R. § 404.1520(a) (1968).

of his or her age, education, and work experience." [22]

The Secretary contends that the screening out of claims in which the impairment is plainly *de minimis* is a long-standing SSA practice which is necessary to the efficient running of the SSI and OASDI programs.

There are several flaws in these arguments. First, although the Secretary's 1978 commentary on the severity regulation appears to describe what might be considered a *de minimis* standard for screening out unfounded claims, the regulation itself does not use the Secretary's language. The regulation does not describe non-severe impairments as ones which "have such a minimal effect . . . that they would not be expected to interfere with his or her ability to work irrespective of his or her age, education, and work experience." Instead, the severity regulation states:

> "(c) *You must have a severe impairment.* If you do not have any impairment(s) which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education and work experience. . . ." [23]

The named plaintiffs' cases illustrate that this regulation constitutes much more than a *de minimis* standard. Plaintiff Dixon, for example, who is completely without sight in one eye, has a personality

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[22] 43 Fed.Reg. 9284, 9296 (1978).

[23] 20 C.F.R. §§ 404.1520(c), 416.920(c) (1983).

disorder and a verbal I.Q. of 68, and requires rehabilitation therapy five days a week, can hardly be said to have impairments of such a *de minimis* nature that they would not be expected to interfere with anyone's ability to work irrespective of vocational factors. Indeed, in our view none of the named plaintiffs in this action have impairments which could be considered to be of the *de minimis* nature described by the Secretary, or which could be viewed as fitting the pre-1978 definition of a "slight" impairment. Even if the Secretary may be assumed to have authority to screen out claims in which the impairment is clearly *de minimis*, the severity regulation as written and as applied does not appear to be such a standard.

Second, the available statistics on the numbers of claims denied on the basis of the severity regulation strongly suggest that the regulation's adoption represented not merely a fine-tuning of previous methods of determining disability, but instead constituted a substantial change in the administration of the benefits system. In 1975, when the "slight impairment" regulation was in effect, only 8 percent of disability claims were denied based on medical grounds alone—*i.e.*, on the ground that the claimant suffered from only a "slight" impairment. As of 1982, the percentage of claims denied on the basis of medical considerations alone under the severity regulation adopted in 1978 had climbed to 40 percent.[24] Although of course we cannot rule out the possibility that other factors apart from the change in the severity regulation may have contributed to this increase,

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[24] *See* Background Material and Data on Major Programs Within the Jurisdiction of the Committee on Ways and Means, W.M.C.P. 98-2, Committee on Ways & Means, United States House of Representatives, 98th Cong., 1st Sess. at 79 (1983).

it would be absurd to assume that the change in the regulations has not played a substantial part in it.

Third, the Secretary's own 1980 statement explaining the intent of the 1978 amendments belies her current contention that the severity regulation was not intended to raise the level of severity which a claimant must show before vocational factors will be considered. As discussed earlier, the 1978 regulations were slightly modified in 1980, primarily to make theid language more understandable to claimants. In publishing these modifications, the Secretary commented on the severity regulation as follows:

> "Although this evaluation approach to impairments that are not severe has been in the regulations for some time, we expanded it in 1978. . . . We anticipated that greater program efficiency would be obtained by this provision by limiting the number of cases in which it would be necessary to follow the vocational evaluation sequence. . . ."[25]

Although the Secretary now argues that this statement does not reflect an intent to limit entitlement to benefits by the adoption of the 1978 regulations, there can be no blinking the Secretary's 1980 statement that the regulation *was* intended to "limit[] the number of cases" in which vocational factors would be considered—something which, it would appear, can only be accomplished by increasing the number of cases decided on medical grounds alone.

Moreover, the severity regulation cannot be persuasively defended by arguing that the denial of substantial numbers of claims on medical grounds alone

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[25] 45 Fed.Reg. 55574 (1980).

is merely the flip side of the Secretary's policy of granting claims on medical grounds alone where the claimant's impairment is among those listed in Appendix 1 of the regulations.[26] If the Secretary believes that it is operationally more efficient to concede, in effect, that certain impairments are *per se* disabling, than to conduct vocational evaluations for claimants with such impairments, such a decision is within her discretion, if only because no one would have standing to challenge it.[27] It is quite another thing to deny disability claims without consideration of the individual's vocational characteristics or his ability to return to his past work, when the statute defines disability so as to require consideration of such factors. The Secretary cannot point to a practice which is judicially unreviewable to prove the validity of a practice which is reviewable.

The Secretary further argues that the validity of the severity regulation is supported by the legislative history accompanying the 1967 enactment of the statute's current definition of disability. The Secretary argues that the 1967 revisions were prompted by Congress' desire to make medical considerations paramount in disability determinations, and that the severity regulation carries out this intent by requiring an initial evaluation of severity to be based solely on the medical evidence. This argument, however,

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[26] *See* 20 C.F.R. §§ 404.1520(d), 416.920(d).

[27] Of course, Congress can correct administrative rulemaking which it may consider more "generous" than the statute warrants by revising the underlying statute; however, since the disability benefits system is (theoretically, at least) not an adversary process, no one has standing to challenge a grant of benefits by the Secretary in an individual case.

rests on an incomplete picture of Congress' purpose in enacting the 1967 legislation. Although the 1967 amendments were clearly intended to limit the statute's definition of disability, the House and Senate reports indicate that Congress was primarily concerned with matters other than the questions presented by this action. Congress was reacting in particular to judicial decisions which had interpreted the statute to permit benefits to be awarded to people who were actually working.[28] The amendments were also intended to overrule decisions which had held that a claimant's disability or non-disability had to be evaluated in terms of the actual jobs available within a narrow geographic area, rather than in terms of jobs generally available within the national economy. In addition, the amendments expressly required that claims of disability be supported by objective medical findings, rather than solely on a subjective claim of disability.[29]

The item of legislative history upon which the Secretary primarily relies as supporting her severity regulation is a passage from the report of the Senate Committee on Finance, which stated that the amendments

> "would provide that such an individual would be disabled only if it is shown that he has a severe medically determinable physical or mental impairment or impairments; that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability; and that if, considering the severity

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[28] *See* S.Rep. No. 744, 90th Cong., 1st Sess. at 48 (1967), *reprinted in* 1967 U.S.Code Cong. & Ad. News, 2834, 2882.

[29] *Id.* at 2882-83.

> of his impairment together with his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability . . . ." [30]

The Secretary contends that this passage reflects the Committee's view that, under the new definition of disability, the claimant's ability to perform previous work and his age, education, and work experience would be considered only if the impairment is first found to be severe.

The problem with this argument is that Congress simply did not write the statute that way. The statute expressly defines severity in terms of the effect of an impairment on the claimant's ability to perform his prior work or other work available in the national economy, in light of the claimant's age, education and work experience. In any event, the passage relied upon by the Secretary is somewhat ambiguous; it can be read simply as an explanation of the overall circumstances under which a finding of disability or non-disability will be made, rather than as a fixed sequence of screening steps under which a "severity" test is somehow a condition precedent to any consideration of the claimant's ability to engage in his prior work or of the other vocational factors.

Furthermore, the Secretary's discussion of Congress' intent ignores the fact that when Congress decided, in another part of the statute, to permit the denial of benefits for certain claimants based on the level of severity alone without individualized consideration of vocational characteristics, Congress unam-

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[30] *Id.* at 2882.

biguously expressed that intent. The definition of disability for widows' and widowers' benefits reads:

> "A widow, surviving divorced wife, or widower shall not be determined to be under a disability (for purposes of section 402(e) or (f) of this title) unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity."

42 U.S.C. § 423(d)(2)(B). The contrast between this definition and that of section 423(d)(2)(A) (applicable to insured workers) provides strong support for plaintiffs' argument that Congress intended the latter group of claimants to be evaluated in terms of the combined effect of the severity of their impairments and their individual vocational characteristics.

Finally, it must be noted that the severity regulation is in conflict with longstanding judicial interpretations of the burden of proof which claimants must satisfy in order to establish a prima facie case of disability. Under these precedents, which the Secretary does not challenge, "[a] prima facie case of disability is established when the claimant shows that he is unable to perform his past employment because of his impairments. *Dumas v. Schweiker*, 712 F.2d 1545, 1550 (2d Cir. 1983).[31] The burden then shifts

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[31] *Accord, Dousewicz v. Harris*, 646 F.2d 771, 772 (2d Cir. 1981); *Parker v. Harris*, 626 F.2d 225, 231 (2d Cir. 1980). These burden-of-proof rules are applied in other circuits as well. *See, e.g., Hall v. Secretary of HEW*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Hephner v. Mathews*, 574 F.2d 359, 361-62 (6th Cir. 1978); *Small v. Califano*, 565 F.2d 797, 800 (1st Cir. 1977).

to the Secretary to prove the existence of other substantial gainful work in the national economy which the claimant is capable of performing. *Id.*

Under the severity regulation, however, the Secretary simply disregards proof that the claimant cannot perform his prior work, if the claimant cannot first satisfy the severity test based on medical considerations alone. In plaintiff Joanne Lockett's case, for example, it is undisputed that she is unable to return to her prior work as a telephone company operator and supervisor because of the deterioration of her mental functions and capabilities. Nonetheless, the ALJ did not conduct a vocational analysis to determine whether she can perform other substantial gainful work, because he found that her impairment did not significantly limit her ability to perform basic work-related activities and therefore was not severe.[32] Indeed, it is not uncommon to see reported decisions in which the ALJ has carried out the full sequential evaluation, including the vocational analysis, and has found the claimant disabled, but the Appeals Council has nevertheless reversed on the basis that the claimant's impairment is not "severe."[33] The Secretary does not argue that this Circuit's precedents regard-

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[32] It must be emphasized that although the severity regulation speaks of the claimant's ability to perform basic work-related activities, the Secretary does not consider the individual's particular vocational characteristics in making the severity assessment. Rather, the Secretary evaluates the medical evidence to determine whether the claimant's impairment imposes a significant limitation on his ability to perform activities such as walking, standing, sitting, lifting, following instructions, relating to co-workers and supervisors, etc. *See* 20 C.F.R. 404.1521(b).

[33] *E.g., Trafton v. Heckler*, 575 F.Supp. 742 (D.Me. 1983); *Scruggs v. Schweiker*, 559 F.Supp. 100 (MD.Tenn. 1982).

ing the allocation of the burden of proof are incorrect, but neither does she suggest how they can be reconciled with the severity regulation.

For all of the reasons discussed above—the conflict between the severity regulation and the plain language of the Act's definition of disability; the clear evidence that the regulation is not being applied as a *de minimis* standard as the Secretary claims; the fact that Congress expressly excluded consideration of vocational factors for widows' and widowers' benefits, but expressly included such factors in the statutory definition at issue here; and the inconsistency of the regulation with long-standing burden-of-proof rules, which Congress has never attempted to alter—we conclude that plaintiffs have established a probability of success on the merits as to their claim that the Secretary exceeded her statutory authority in establishing the severity regulation.[34]

We also note that plaintiffs, in addition to this showing, have submitted further evidence in the form of an affidavit by Marvin S. Lachman, Chief Social Services Disability Analyst in the Office of Disability Determinations ("ODD"), to support the contention that the Secretary, through internal administrative actions beginning in 1976, deliberately altered the substantive standards governing the circumstances

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[34] Plaintiffs also contend that the severity regulation is unlawful because the Secretary violated the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to inform the public that the rule represented a major change in the substantive standards by which disability claims would be evaluated. In view of our conclusion that plaintiffs have demonstrated a probability of success on the other grounds set forth above, we need not address this claim at this time. We also need not address the constitutional issues raised by plaintiffs.

under which claims could be denied on medical grounds alone, long before the new regulations were publicly proposed and adopted, and indeed without having admitted to this day that the 1978 regulations represented a change in policy. We do not rely on this evidence, because the points previously discussed establish the likelihood of plaintiffs' success on the merits, and the Lachman affidavit raises issues that may require further factual development.[35] Nonetheless, it is worth noting that the affidavit presents strong evidence that the Secretary deliberately implemented a policy of requiring states (which bear the initial burden of making disability determinations) to reject greater and greater numbers of claims on medical grounds alone,[36] while simply refusing to acknowledge, either in 1976 when the policy emerged, in 1978 when the severity regulation was actually adopted through public rule-making, or at any time thereafter, that a policy change had taken place.[37]

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[35] It is appropriate to note, however, that the affidavit submitted on behalf of the Secretary by Jean Hall Hinckley, Acting Deputy Associate Commissioner for Disability, presents little to counter the assertions of the Lachman affidavit. Although the Secretary was given, over plaintiffs' strenuous objections, approximately nine weeks to respond to the Lachman affidavit, the Hinckley affidavit offers little but speculation that the 1976 increase in returns of ODD disability determines may have been caused by factors other than a substantive policy change.

[36] The procedures by which the Secretary is able to use her administrative oversight of state disability agencies to effect policy changes in the treatment of disability claims is described in the Lachman Affidavit and in *City of New York v. Heckler*, 578 F.Supp. 1109, 1113-14 (E.D.N.Y. 1984).

[37] Although the Secretary's 1980 statement in the Federal Register as to the intent of the 1978 regulations, see discus-

D. SSR 82-55

SSR 82-55 provides directions to SSA personnel on how to apply the Secretary's severity regulation. The ruling contains a list of 20 impairments that are to be considered per se non-severe. In addition, the ruling directs SSA adjudicators to evaluate the severity of a claimant's impairments singly, not in combination. Thus, if each of a claimant's impairments is deemed not severe standing alone, no consideration may be given to their combined effect on the claimant.

1. Standing

Before addressing the merits of plaintiffs' position as to this ruling, we must consider the plaintiffs' standing to challenge it, an issue raised by the Government. We believe plaintiffs have amply demonstrated standing to challenge the policies set forth in SSR 82-55. The Government argues that irrespective of SSR 82-55, the named plaintiffs' impairments were in fact considered in combination by the ALJs, and that therefore none of the plaintiffs have standing to challenge that aspect of SSR 82-55. However, as plaintiffs point out, there is no mention whatsoever of such consideration in the ALJs' decisions denying benefits to plaintiffs Dixon, Carrasquillo, Ramirez, Terez and Feliciano.[38] Thus, these plaintiffs clearly

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sion *supra*, might be seen as such an acknowledgement, the Secretary states that the statement should not be so interpreted.

[38] The statements in those decisions that the claimants had no "impairment or impairments" that were severe, upon which the Government relies, certainly offer no basis for the conclusion that the combined effect of plaintiffs' impairments was considered.

have standing to challenge the Secretary's policy of refusing to consider the combined effects of unrelated impairments. As to plaintiffs Casey and Gonzalez, although the ALJs did state in conclusory fashion that their impairments were not severe either singly or in combination, the opinions indicate that each impairment was evaluated individually and found not severe.[39] In view of the fact that SSR 82-55 contains a binding directive that the combined effect of non-severe impairments is not to be considered, we believe that, in order to establish that the ALJs ignored the ruling and gave full consideration to the combined effect of plaintiffs' impairments the Secretary must do more than point to such conclusory statements.

Moreover, several of the named plaintiffs suffer from impairments listed as *per se* non-severe conditions in SSR 82-55. Plaintiffs Dixon and Ramirez have suffered a loss of sight in one eye, a *per se* non-severe impairment under the ruling. Plaintiffs Carrasquillo, Terez and Casey suffer from arthritis, which is *per se* non-severe if there are "minimal abnormal findings on physical examination." Plaintiffs Carrasquillo, Casey and Gonzalez also suffer from hypertension, which is considered non-severe if it is not accompanied by end organ damage. In view of the ALJ's obligation to consider these impairments non-severe, the fact that the ALJs did not specifically mention SSR 82-55 in their decisions does not undermine these plaintiffs' standing to challenge the policy set forth in that ruling. In any event, the ALJ who

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[39] The decision in plaintiff Lockett's case contains a similar statement, although there is no indication of whether the ALJ deemed Lockett to have several district neurological and psychological impairments, or just one impairment with several manifestations.

ruled on Gonzalez' claim did refer to SSR 82-55 in his decision, and thus at the very least Gonzalez has standing to represent a class of claimants challenging this aspect of SSR 82-55.

2. The Merits

The Secretary's policy of refusing to consider the combined effects of impairments which are individually found not to be severe is manifestly irrational and finds no support either in logic or in the Social Security Act. SSR 82-55 contains the following explanation of the Secretary's policy:

> "Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs."

In much the same way, a mathematician might prove that because two does not equal four, two plus two never equals four either.[40]

Clearly, in order to determine, as the Act requires, whether a claimant has an "impairment or impair-

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[40] The Secretary's reasoning might be defensible if a nonsevere impairment were defined as one which places *no* limits on a claimant's ability to perform basic work-related activities. In that event, several "impairments" which place no limitation on a claimant's activity could be assumed to have no effect in combination as well. The severity regulation, however, defines a severe impairment as one which *significantly* limits work-related functions. Obviously, two impairments which individually do not place a significant limitation on a claimant's work-related abilities, but which each places some limitation on his abilities, may in combination place a significant limitation on his abilities.

ments") of such severity that he cannot perform any "substantial gainful work," the Secretary must consider the total effect of an individual's impairments on his ability to perform gainful work.[41] Under the Secretary's policy, however, a claimant who suffers (for example) from all twenty *per se* non-service impairments listed in SSR 82-55, and thus suffers from arthritis, loss of one eye, hypertension, obstructive airway disease, eplipsy, chronic liver disease, a peptic ulcer and diabetes, along with the twelve other listed impairments, is conclusively presumed not to meet the Secretary's severity threshold and thus is not disabled. If such a person is also 59 years old, illiterate, does not speak English, and has no work experience, such circumstances are simply irrelevant, because in the absence of a severe impairment the claimant's vocational factors will not be considered. Such a result clearly cannot have been contemplated by Congress when it drafted the definition of disability which appears in the Act. Accordingly, plaintiffs are plainly entitled to preliminary relief enjoining the Secretary from continued enforcement of her policy of disrgarding the combined effects of non-severe impairments.

As to the Secretary's policy that a claimant will never be found disabled if his impairment is one of those listed in SSR 82-55, such a policy is unlawful for the same reason that the severity regulation is unlawful. The disability statute requires consideration of the combined effect of an individual's impair-

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[41] Decisions of this Circuit have held that the regulations require the ALJ to consider the combined effect of a claimant's impairments. *See Felshina v. Schweiker*, 707 F.2d 71, 73 (2d Cir. 1983); *Kolodnay v. Schweiker*, 680 F.2d 878, 879-80 (2d Cir. 1982).

ment and his age, education, work experience, and ability to return to prior work. The severity regulation is unlawful because it mandates the denial of claims without consideration of vocational factors. It follows that the use of a list of *per se* non-severe impairments to deny disability claims without evaluation of vocational factors is also unlawful.[42] Indeed, as plaintiffs point out, the use of such a list means that many claims will not even be evaluated in terms of the effect of the impairment on the claimant's ability to perform basic work-related functions, as the severity regulation itself requires. As one commentator has stated, the listed impairments "are not for the most part, examples of slight functional impairments at all but, rather, examples of medical conditions. Example 1(a) thus does not refer to whether or not the individual can bend, stoop, sit, etc., but, rather, to osteoarthritis with minimal abnormal findings."[43] This *per se* approach to disability evaluations is simply inconsistent with the Act.[44]

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[42] The Fourth Circuit has long held such a practice to be unlawful. *See Martin v. Secretary of Health, Education & Welfare,* 492 F.2d 905 (4th Cir. 1974); *Hyatt v. Heckler,* 579 F.Supp. 985 (D.N.C. 1984).

[43] Goldhammer & Bloom, *Recent Changes in the Assessment of Pain in Disability Claims Before the Social Security Administration, Social Security Reporting Service* 306 (January 1984).

[44] Plaintiffs also argue that SSR 82-55 is unlawful because it was not promulgated in accordance with the notice-and-comment procedures of the APA. The Secretary argues that SSR 82-55 is merely an interpretive rule and as such is not subject to the APA's notice-and-comment requirements. Although an agency's characterization of its own rules is entitled to deference, it is not necessarily dispositive in all circumstances. *See generally Cabais v. Egger,* 690 F.2d 234 (D.C.

E. Irreparable Harm

As discussed above the illegal denial of benefits to the plaintiffs in these cases is causing irreparable harm. David Dixon has not been able to work since 1974, and public assistance is his sole means of support. He has not bought new clothing for three years. Ricardo Ramirez has not worked since 1978 as a result of his disabilities, and the sole means of support for Ramirez, his wife, and their three small children, is $428 per month in public assistance and $120 per month in food stamps. Their rent is $348 per month, and the family is behind in paying its rent and utilities, and goes without food at times. Joanne Lockett's sole source of income is her pension of $429.09 per month and she states that she owes approximately $700 in medical bills and fears that she will not be able to pay future medical expenses. The circumstances of the other named plaintiffs are similar. The harm that they are suffering on a day-to-day basis as a result of their desperate financial circumstances cannot be repaired by a retroactive award of benefits. Accordingly, the irreparable harm element of the test for preliminary relief is amply satisfied here.

F.

In holding that plaintiffs have demonstrated a likelihood of success as to the invalidity of the severity regulation, we are aware that some courts outside

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Cir. 1983). We need not resolve this question here, however, since we find the policies set forth in SSR 82-55 to be invalid on other grounds. Regardless whether the ruling is subject to notice-and-comment requirements, the substantive policy set forth in the ruling may be enjoined if it is inconsistent with the statute.

this Circuit have construed the regulation narrowly so as to save it from a finding of invalidity. With respect to these courts, we believe the analysis in these opinions is incorrect and is likely to result only in continued confusion and endless appeals of decisions in which the Secretary's findings of non-severity is reversed for failure to follow the court's construction of the regulation. In *Brady v. Heckler*, 724 F.2d 914 (11th Cir.1984), the Eleventh Circuit rejected a challenge to the severity regulation, holding that the regulations enacted in 1978 (and slightly modified in 1980)

> "were not meant to alter the level of severity for a finding of not disabled on the basis of medical considerations alone. Under the 1968 and 1978 regulations, an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience."

Id., at 920. Having interpreted the severity regulation in this *de minimis* fashion, the Court resoundingly reversed the ALJ's finding that the plaintiff's impairments were not severe, stating:

> "an individual who suffers from pericarditis, hypoglycemia, vertebro vascular insufficiency, mental depression, and possible emphysema, is not suffering from a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities."

Id. at 921.

Other courts have stopped short of ruling on the validity of the severity regulation itself, by simply announcing what they believe to be the correct manner of applying the regulation, and reversing the ALJ's decision for failing to apply the regulation correctly. For example, in *McCullough v. Heckler*, 583 F.Supp. 934 (N.D.Ill.,1984), the Court stated that the severity regulation

> "should be employed only when a claim is so groundless that any analysis of the claimant's work experience or residual functional capacity would be a waste of time. Doubts should be resolved against resting any decision on 'severity' alone. . . ."

Id. at 937-938. In *Hundreiser v. Heckler*, 83 Civ. 4360, slip op., (N.D.Ill. March 19, 1984), the Court announced a slightly different approach, ruling that disability claims cannot be denied merely on a finding of non-severity, if the claimant establishes that he is unable to return to his prior work:

> "the claimant can . . . rebut the Secretary's [finding of non-severity] by showing that his impairments prevent him from doing his past work. In other words, by making out a prima facie case of disability through showing an inability to do past work due to 'an impairment' the claimant necessarily satisfies the 'severe' impairment requirement of 20 C.F.R. § 404.1520(c)."

Id. at pp. 23-24.[45]

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[45] *See also Wallschlaeger v. Schweiker*, 705 F.2d 191 (7th Cir. 1983) (treating the definition of severity in the regulations as an essentially tautological one, in order to reconcile the regulation with the statutory definition of disability);

The common conclusion of these opinions, all of which have been handed down in individual disability appeals, is that the problem dies not in the severity regulation itself, but in the improper application of the regulation by SSA personnel. In none of these cases, however, was the court's attention directed to SSR 82-55—which makes clear the fact that SSA personnel are not permitted to apply the severity regulation merely as a *de minimis* standard—or to the statistical evidence illustrating the dramatic rise in the percentage of cases denied on medical grounds alone since the enactment of the severity regulation.

As our analysis on the merits indicates, the problem lies not in the proper application of the severity regulation, but instead in the conflict between that regulation and the statutory definition of disability. Neither sound policy nor appropriate respect for Congress' goal of establishing a functioning system of benefits administration is properly served by endless case-by-case reversals of ALJ's decisions, in which the judiciary plays the role of Cuchulain battling the invulnerable tide. Because the severity regulation, and the policies set forth in SSR 82-55, conflict with the Social Security Act, they are invalid.

III. Class Certification

Plaintiffs move pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2) for certification of a class consisting of

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Scruggs v. Schweiker, 559 F.Supp. 100 (M.D.Tenn. 1982) (announcing that in future Social Security appeals where the ALJ's analysis ended with the application of the severity test, the Court would apply a set of presumption to supply the missing fact-findings under the remainder of the sequential evaluation).

> "All persons in the State of New York who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, and whose benefits have been or will be denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920 (c) and .921 (1982), and Social Security Rulings cum. ed. 82-55 (1982); and all recipients of such benefits who have made or will make claims for continued benefits (through participation in a Continuing Disability Interview), and whose benefits have been or will be terminated pursuant to the same policies."

The Secretary raises several objections to certification of the class as so defined. She contends that the class is overly broad because it includes individuals who (1) received final decisions from the Secretary more than 60 days prior to the filing of the complaint in the instant action and who have not filed claims in federal court, and thus have failed to meet the 60-day filing deadline required by section 405(g) and 1383(c)(3); (2) have not fully exhausted their administrative remedies as required by sections 405 (g) and 1383(c)(3); and (3) have not yet filed claims for benefits or had their benefits terminated, and thus have not satisfied the presentment requirement of sections 405(g) and 1383(c)(3).[46]

The exhaustion requirement has already been discussed above, in section II. A. of this Memorandum, and we have concluded that the requirement is waived in this case on account of the irreparable harm being

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[46] The Secretary's argument that none of the named plaintiffs have standing to challenge SSR 82-55 has already been discussed and rejected in section II. D. 1. of this memorandum.

suffered by claimants who are unlawfully denied benefits. The questions that remain to be resolved are whether the class may include those individuals who received final decisions more than 60 days prior to the filing of the original complaint in this action, and whether class certification may extend to future applicants for benefits.

Ordinarily, a claimant who has received a final decision by the Secretary denying benefits must file a complaint in federal court within 60 days of the denial of his claim will be time-barred. However, the 60-day requirement constitutes a statute of limitations and not a jurisdictional bar, and some courts have held it to be inapplicable in cases such as this, which involve systemwide challenges to the Secretary's regulations rather than individual claims for benefits. *See Lopez v. Heckler*, 725 F.2d 1489, 1505-07 (9th Cir. 1984); *City of New York v. Heckler, supra*, 578 F.Supp. at 1124.

The plaintiffs suggest that, since preliminary relief is being sought only by those class members who satisfy the 60-day requirement, the Court may certify a conditional class limited to those individuals, and reserve decision on the ultimate scope of the class until a final judgment is entered. Such a step appears appropriate, in view of the fact that the question whether the 60-day requirement may be waived in cases such as this is currently before the Court of Appeals as part of the appeal of *City of New York v. Heckler, supra*.

The only remaining question, therefore, is whether the class may be defined so as to include future claimants whose applications for benefits will be denied or terminated as a result of the severity regulation and/or SSR 82-55. The Secretary argues that the class

cannot include future claimants because such individuals have not yet presented any claim to the Secretary and thus have not satisfied the unwaivable presentment requirement of section 405(g) of the Act.[47] Plaintiffs argue that defining the class to include future claimants is simply intended to assure that the legality of the Secretary's policies need not be litigated over and over again as new claimants apply for benefits. They point out that classes challenging governmental action routinely include future members of the class. *E.g., Brown v. Board of Education*, 84 F.R.D. 383 (D.Kan.1979).

The plaintiffs' argument is persuasive. The inclusion of future members of the class definition creates no jurisdictional problem under section 405(g), because such individuals will not actually be covered by any order or judgment entered in these cases until they do make a claim for benefits in some form, thus satisfying the presentment requirement.

There is no dispute as to the remaining requirements for class certification. The proposed class clearly meets the numerosity, commonality, typicality, and fair representation requirement of Fed.R.Civ.P. 23(a).[48] In addition, the class satisfies the requirement of Rule 23(b)(2), which permits certification where

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

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[47] See section II. A. of this memorandum, *supra*.

[48] *See* Affidavit of Nancy Morawetz, dated January 26, 1984.

Accordingly, the motion for class certification is granted, with the proviso that the class presently include only those members who satisfy the 60-day filing requirement of section 405(g) of the Act.

* * * * *

The motion for a preliminary injunction is granted. The motion for class certification is granted to the extent indicated in this opinion.

Settle order on notice.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 83 Civ. 7001 (MEL)

DAVID DIXON, on behalf of himself and all others similarly situated, PLAINTIFF

and

DOMINGA CARRASQUILLO, OPHELIA CASEY, RICARDO RAMIREZ, HELEN SPIRES and JOANNE LOCKETT, PROPOSED PLAINTIFF-INTERVENORS

and

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services, PROPOSED PLAINTIFF-INTERVENORS

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

June 22, 1984

LASKER, District Judge.

This memorandum addresses motions to intervene by Dominga Carrasquillo, Ophelia Casey, Ricardo Ramirez, Joanne Lockett, Helen Spires, the State of New York, and Cesar Perales, as Commissioner of the New York State Department of Social Services. The subject of this action, a challenge to the legality of the standards by which claims for disability benefits are evaluated, is described in a separate opinion issued this date on plaintiff's motion for a preliminary injunction and class certification.[1]

I.

Dominga Carrasquillo, Ophelia Casey, Ricardo Ramirez, Joanne Lockett, and Helen Spires, all of whom have been denied disability benefits on the ground that their impairments are not severe, move to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. Rule 24(b)(2) authorizes permissive intervention where the intervenor's claim and the main action "have a question of law or fact in common." The Secretary of Health and Human Services (the "Secretary") consents to the intervention of Carrasquillo, Casey and Ramirez, and accordingly the motion is granted as to them. The Secretary objects, however, to the intervention of Lockett and Spires, on the grounds that Lockett has not sought Appeals Council review of the ALJ's decision and therefore is barred from pursuing her claim, and that Spires does not reside in this district.

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[1] This action has been consolidated with Nos. 83 Civ. 8609 (*Feliciano v. Heckler*), 83 Civ. 8264 (*Terez v. Heckler*), and 84 Civ. 0110 (*Gonzalez v. Heckler*), all of which assert class allegations challenging the same regulations and policies challenged in the instant case, 589 F.Supp. 1494.

In response, Lockett's legal representative has submitted an affidavit stating that Spires does not reside in this district.

In response, Lockett's legal representative has submitted an affidavit stating that an appeal was filed and that she has had communications with the Appeals Council which confirm this.[2] The Secretary now states that SSA is reviewing its records to verify Lockett's appeal. Accordingly, Lockett's motion to intervene is granted, without prejudice to the Secretary's right to move to dismiss at a later date if the facts warrant.

The motion to intervene is denied as to Spires. Even if the incorrect venue of her claim is not an automatic bar, intervention is unwarranted because her case has now been remanded for rehearing pursuant to the decision in *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984).[3]

II. The State of New York and the Commissioner of the New York State Department of Social Services

The State of New York and Cesar Perales, Commissioner of the New York State Department of Social Services of the State of New York (together, the "State"), move to intervene as of right as plaintiffs,

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[2] Affidavit of Dolores Britt, dated March 20, 1984.

[3] Although Spires continues to press her motion for intervention on the ground that *City of New York* did not address the validity of the severity regulation, we perceive no basis for permitting her intervention in view of the complications that are likely to arise from the fact that her case is already on remand. Insofar as she has an interest in the legality of the severity regulation, her membership in the plaintiff class will adequately protect that interest.

pursuant to Fed. R. Civ. P. 24(a), on the grounds that they have a direct interest in plaintiffs' challenge to the severity regulation and that the disposition of the action may impair or impede their ability to protect that interest. Alternatively, they seek permissive intervention pursuant to Fed. R. Civ. P. 24(b), on the grounds that they are charged with administering the challenged standards and that their proposed complaint raises similar questions of law and fact to those raised by the plaintiffs.

Cesar Perales (the "Commissioner") is responsible for administering the New York State Office of Disability Determinations ("ODD"), which, under an agreement between the State and the Secretary, makes the initial determination of whether an individual is disabled for the purposes of the federal Supplemental Security Income ("SSI") and Old Age Survivors and Disability Insurance ("OASDI") programs. ODD is required to comply with all federal regulations and all applicable rules, written guidelines and instructional materials issued by the Secretary.[4] The Secretary reviews case samples from ODD. If the Secretary finds that ODD is not determining disability applications in a manner consistent wiht her rules and regulations, she may terminate the state's authority to make disability determinations, and assume responsibility for New York claims herself.[5]

To intervene as of right under Rule 24(a)(2), an intervenor must show that

> "(1) the application is timely; (2) 'the applicant claims an interest relating to the property

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[4] 42 U.S.C. § 421(a)(2); 20 C.F.R. § 404.1603(a) and 416.1003(a) (1983).

[5] 42 U.S.C. § 421(b)(1); 20 C.F.R. §§ 404.1670-75 and 416.1070-75 (1983).

> or transaction which is the subject matter of the action . . . .'; (3) the protection of the interest may as a practical matter be impaired by the disposition of the action; and (4) the interest is not adequately protected by an existing party."

Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984). The major point of dispute on this motion is whether the State's interest in the subject matter of the action is adequate to support intervention as of right. The State intervenors argue that they have a sufficient interest because (1) the Secretary's use of the severity regulation forces the State to choose between making disability determinations based on standards they believe to be unlawful, or incurring severe administrative sanctions, including possible takeover of their program by the Secretary, if they refuse to follow those standards; (2) the Secretary's denial of disability benefits to New York residents increases the costs of state and local public assistance programs; (3) the State has a *parens patriae* interest in the health and economic welfare of its citizens.

The Secretary answers that none of the asserted interests is sufficient to confer standing on the State to challenge the Secretary's regulations under Fed. R. Civ. Pr. 24(a)(2). In particular, the Secretary contends that (1) the possibility that New York's disability program, will be taken over by the Secretary if the State refuses to follow the Secretary's regulations is too contingent to support intervention, and in any event the State's participation is voluntary and therefore it is not being required to administer regulations it believes to be illegal; (2) the increased burden on state public assistance programs caused by denials of federal disability benefits does

not create a protectable interest because the OASDI and SSI programs are not intended to ease the financial burden of state public assistance programs; and (3) a state is without standing as *parens patriae* to bring an action based on federal law against the federal government.

If any one of the interests asserted by the State is adequate to support intervention, then this aspect of the test for intervention as of right is satisfied. The "interest" required under Rule 24(a), as the Court of Appeals has stated "defies a simple definition," but must be one which is " 'significantly protectable' " and is "direct, as opposed to remote or contingent." *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984), *quoting Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971).

The first interest asserted by the State arises out of its responsibility for making disability determinations and the threat of a possible federal take-over of the State's program if it refuses to follow regulations it believes to be illegal. Such an interest appears more than adequate to support intervention. The possibility of a federal assumption of the State's program cannot be considered excessively remote and contingent in light of the Secretary's previous threats to institute precisely such a takeover when the State has resisted other aspects of the Secretary's regulations which the State believes to be illegal.[6] The fact that the State's participation in the disability benefits program is voluntary, moreover, does not constitute a basis for concluding that the State has no interest in applying lawful rather than unlawful standards in making

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[6] *See* Affidavit of Nelson Weinstock, dated April 26, 1984, ¶ 8.

benefits determinations. The conflict between the State's duty to follow the Social Security Act, and its duty to follow the Secretary's regulations, creates a dilemma for the State which is sufficiently real to justify its intervention in this lawsuit. *Cf. City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973) (city officials have standing to challenge a state statute alleged to be in conflict with the United States Constitution).

The State also relies upon its economic interest in the proper administration of the federal disability programs, contending that disabled individuals who are denied benefits because of the Secretary's unlawful regulations are compelled to turn to state and local public assistance programs upon which they would otherwise not have to deepnd. The Secretary does not argue that this burden is insubstantial, but that it is not a legally cognizable interest because the federal disability programs are intended only to benefit disabled individuals, not to ease the state's public assistance costs. However, as Judge Weinstein specifically held in *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984), the legislative history of the SSI and OASDI programs shows that one of Congress' express purposes in establishing the programs was in fact "to relieve state and local governments of the soaring costs of the existing programs." *Id.* at 1121. We find Judge Weinstein's analysis persuasive, and for the reasons stated in his opinion conclude that the State's economic interest in the proper administration of federal disability benefits is adequate to support intervention.[7]

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[7] *See also Abrams v. Heckler*, 582 F.Supp. 1155 (S.D.N.Y. 1984); *New York v. Schweiker*, 557 F.Supp. 354, 358 (S.D.

In light of the conclusions reached above, we need not resolve the rather complex question of whether the State also has an interest warranting intervention by virtue of its *parens patriae* interest in the health and economic welfare of its citizens. *Compare City of New York v. Heckler*, *supra*, 578 F. Supp. at 1122-23, *with Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16, 102 S.Ct. 3260, 3270 n.16, 73 L.Ed.2d 995 (1982).

The State's satisfaction of the remaining requirements for intervention as of right are not significantly in doubt. The motion to intervene was made approximately two months after the amended complaint was filed, prior to oral argument of the motion for preliminary relief, and is timely. Moreover, although the State shares a similar objective to that of the plaintiffs—namely, to enjoin the Secretary's use of the severity regulation—the State has some interests in the litigation which are not shared by plaintiffs, and which therefore are not "adequately represented by existing parties." (Fed. R. Civ. Pr. 24(a)). As the State points out, it has an interest in attempting to assure, should it prevail in this action, that the Secretary provides administrative funds to the State to permit compliance with the judgment, along with the appropriate instructions and guidelines to

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N.Y. 1983); *but see Doe v. Heckler*, 568 F.Supp. 681, 683 (D.Md. 1983).

The parties have phrased their arguments in terms of the requirements for interventions, rather than in terms of standing. We note that, for the same reasons that support the State's right to intervene, the State has standing to challenge the Secretary's policies. *See generally Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

ODD personnel for applying any revised standards for disability determinations.

For these reasons, we conclude that the State intervenors are entitled to intervention as of right under Fed. R. Civ. Pr. 24(a).

* * * * *

The motions to intervene are granted.

It is so ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 83-Civ. 7001 (MEL)

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO and JOANNE LOCKETT, individually and on behalf of all other similarly situated, PLAINTIFFS

-and-

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services, PLAINTIFF-INTERVENORS

v.

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services, DEFENDANT

No. 83 Civ. 8264 (MEL)

EULALIA TEREZ, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

No. 83 Civ. 8609 (MEL)

CARMEN FELICIANO, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

No. 83 Civ. 0110 (MEL)

TOMASINA GONZALEZ, individually and on behalf of all others similarly situated, PLAINTIFF

v.

MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, DEFENDANT

[Filed July 26, 1984]

ORDER

Plaintiffs, having moved the Court for class certification and a class-wide preliminary injunction, and the Court having rendered an opinion dated June 22, 1984,

IT IS HEREBY ORDERED that plaintiffs' motion for class certification is granted and that the plaintiff class is defined as follows:

All persons in the State of New York who have filed or will file applications for disability benefits under Title II and/or Title 1VI of the Social Security Act, and whose benefits have been or will be denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920 (c) and .921 (1982), and Social Security Ruling 82-55 (1982); and all recipients of such benefits who have made or will make claims for continued benefits, and whose benefits have been or will be terminated pursuant to the same policies.

The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 19, 1983 and failed to file a complaint in federal district court or to appeal to the next level of administrative review within 60 days after the date of the receipt of such decision.

IT IS FURTHER ORDERED that plaintiffs' motion for a preliminary injunction is granted and that, pending a final determination of this action, defendant, her agents, servants, employees and their successors:

1. Are enjoined from denying or terminating Social Security Disability or Supplemental Security Income benefits due to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1982), and Social Security Ruling 82-55 (1982); and

2. Shall immediately commence identification of all members of the plaintiff class. Defendant shall complete such identification of persons whose benefits have been terminated at the initial or reconsideration levels of review within thirty days of the

date of this order. Defendant shall complete identification of the remaining members of the class within seventy-five days of the date of this order; and

3. Shall send to each class member whose application for benefits was denied, his/her representative and representative payee, a copy of the notice appended hereto as attachment "A" together with an addressed, postage-paid return envelope. The notice to class members shall be sent within three days of the date defendant identifies the class member; and

4. Shall send to each class member whose benefits were terminated, his/her representative and representative payee, a copy of the notice appended hereto as attachment "B" together with an addressed, postage-paid return envelope. The notice to class members shall be sent within three days of the date defendant identifies the class member; and

5. Are directed to reinstate benefits (including Medicare and auxiliary benefits payable on account of Title II disability benefits) calculated as of June 22, 1984 to all members of the class who (a) received decisions, finding them no longer eligible for benefits, that were rendered at any stage of the administrative process, on July 20, 1983 or thereafter, or (b) had timely challenges to such decisions pending on July 20, 1983 or thereafter, provided the class member verifies his/her current address and, in the case of Supplemental Security Income benefits, satisfies the financial eligibility requirements for the receipt of such benefits, except that benefits shall not be reinstated under this order to any class member who has an action pending in federal court based on the termination of his/her benefits unless and until the action is remanded to the Secretary for re-evaluation. As soon as a class member responds to notice "B",

defendant shall forthwith verify the class member's address and, in the case of Supplemental Security Income recipients, shall forthwith verify the class member's financial eligibility; and

6. Shall with respect to those class members whose benefits are to be reinstated pursuant to paragraph 5 above, certify those class members' checks to the Department of the Treasury within 3 weeks of (a) the identification of the class member or the determination that a person who presents him/herself as a potential class member is in fact a class member, (b) the verification of the class member's address, (c) in the case of Supplemental Security Income benefits, the verification of the class member's financial eligibility, and (d) in the case of a class member with an action pending in federal court, the Secretary's receipt of notice that the action has been remanded; and

7. Shall be considered to be in compliance with the provisions of paragraph 5 and 6 above if 95% of those class members entitled to be reinstated to Title II benefits have checks certified to the Department of the Treasury in accordance with the provisions of paragraph 6 above and if 80% of those class members entitled to be reinstated to Title XVI benefits have checks certified to the Department of the Treasury in accordance with the provisions of paragraph 6 above, provided that the remaining class members shall have checks certified to the Department of the Treasury within a reasonable time; and

8. Upon the reinstatement of benefits to those class members whose benefits were terminated as described in paragraphs 5 and 6 above, the Secretary shall have the right to re-evaluate the class members' entitlement to benefits and shall restore benefits ret-

roactively from June 22, 1984 for any period only upon finding that such class members were entitled to receive benefits for that period unless otherwise required pursuant to 20 C.F.R. § 416.1336(b) and POMS § SI 02301.605(D), and shall terminate reinstated benefits only upon finding that such class members are no longer entitled to receive such benefits, provided that such class members shall retain all rights, if any, to continued benefits during an administrative appeal. The Secretary shall have the right to recoup any overpayment made as a result of the provisions of this order in accordance with 20 C.F.R. §§ 404.501-404.515 & 416.501-416.570. Nothing in this paragraph shall be construed as affecting the matters currently being litigated in *Maguire v. Heckler*, 83 Civ. 7055 (RWS); and

9. Are directed to reopen the applications of all class members whose applications for benefits have been denied by the Secretary, at any stage of the administrative process, since July 20, 1983, or had timely challenges to such denials pending on July 20, 1983 or thereafter and to redetermine those applications without reference to the threshold severity test, provided that any action pending in federal court based upon the denial of a class member's application for benefits has been remanded to the Secretary for redetermination.

(a) With respect to class members whose applications for disability benefits have been denied at the initial administrative stage or on reconsideration and who have not requested review by an administrative law judge:

(1) Defendant shall forthwith obtain information on the individual's vocational history, including completion of form SSA-3369. In

no event shall an initial interview be scheduled to be held more than one week after the class member responds to notice A or is otherwise determined to be a class member.

(2) Defendant shall forward the class member' case file to the Office of Disability Determination ("ODD") for a new initial determination within three days of obtaining appropriate vocational information pursuant to subparagraph (a)(1). Defendant shall be considered to be in compliance with the terms of this subparagraph if she forwards 90% of class members' case files to ODD within three days of obtaining appropriate vocational information or two weeks of the date of identifying the class member, whichever is longer.

(3) Defendant shall make all good faith efforts to complete the sequential evaluation of disability within four weeks of the date a class member's case file and completed form SSA-3369 is received by ODD unless the class member submits new medical evidence, requests a full redevelopment of evidence and re-evaluation of disability, or defendant determines that a full redevelopment is required; provided that, in the event ODD receives more than three thousand cases in any one week, those cases in excess of three thousand shall be considered, for purposes of this subparagraph, as received in the following week.

(b) In conducting the redetermination of those applications in which a hearing has been held or in which a request for a hearing is pending, defendant

shall conduct a hearing before an administrative law judge unless a determination of entitlement can be made on the basis of the record. Such hearings shall be scheduled within thirty days of the date the Secretary identifies the class member, or determines that a person who has presented him/herself as a potential class member is, in fact, a class member, or receives notice that the class member's case has been remanded from federal court. Defendant shall make all good faith efforts to hold hearings within forty-five days of the date of identification or determination of class membership or the date of receipt of notice that the class member's case has been remanded; and

10. With respect to those class members who have actions pending in federal court and who either have informed the Secretary that they want their case remanded to the Secretary for a re-evaluation or have failed to so inform the Secretary by responding to the notices appended hereto as attachments "A" and "B" within 30 days of the date of the notices, the Secretary shall move the Court for or otherwise agree to a remand of the case and the placement of the case on the court's suspense calendar; and

11. Shall provide to any person who presents him/herself in person, by telephone or by letter to the Social Security Administration for relief under this Order and, at the time of such presentment, provides his/her name, social security number, telephone number and current address, a copy of the notice appended hereto as attachment "C" stamped by Social Security Administration personnel to indicate the date of his/her presentment. A copy of the notice shall be placed in that person's file if that person in fact has applied for or been terminated from benefits.

Upon such presentment defendant shall within two weeks determine whether such person is a class member and shall provide a written rationale for such determination; and

12. Shall reproduce, in both the English and Spanish language, the notice appended hereto as attachment "D" as a 17 inch by 22 inch poster and cause equal numbers of English and Spanish language copies of such poster to be prominently displayed in all Social Security Administration offices in the State of New York to which the public has access, shall supply plaintiffs' attorneys with 200 copies of said poster in the English language and 100 copies of said poster in the Spanish language, and shall supply the attorneys for plaintiff-intervenor the State of New York with 1000 copies of said poster in the English language and 500 copies of said poster in the Spainsh language; and

13. In the event a class member does not respond to notices "A" or "B" within two weeks, defendant shall exercise additional efforts to contact the class member including phone calls, personal visits, and, as appropriate, contact with family, friends and treating sources. In the event that a class member cannot be notified, defendant shall contact the post office as provided in the POMS, and will, if that is not successful, attempt to locate the individual through family, friends and treatment source, as appropriate; and

14. Shall immediately issue instructions to Social Security Offices in New York State, to the Office of Hearings and Appeals, to the Appeals Council, to the New York Regional Office and to the New York Office of Disability Determinations requiring compliance with paragraph (1). Defendant shall immediately withdraw any and all instructions to stop processing

cases and issuing decisions as a result of this Court's opinion of June 22, 1984; and

15. Shall, within one week of entry of this order, issue instructions for compliance with this order including procedures to be used in identifying class members, responding to inquiries from asserted class members and their advocates, for reevaluating initial claims of plaintiff class members who have been denied at the initial administrative stage or on reconsideration, and for reinstating benefits to class members whose benefits have been terminated; and

16. Shall immediately provide plaintiffs' attorneys with copies of all memoranda, notices, instructions, directives and like documents issued to effect compliance with this order as those documents are issued; and

17. Shall report to plaintiffs' counsel every four weeks with:

(a) a list of the names and social security numbers of class members who have been identified; and

(b) a list of the names and social security numbers of persons who cannot be notified, or have not responded to efforts to notify them made pursuant to paragraph 13; and

(c) the number of class members identified; and

(d) the number of class members sent notices "A", the number sent notice "B", and the number responding to each notice; and

(e) the number of cases ordered forwarded to ODD; and

(f) the number of persons who have presented themselves as potential class members, the

number determined to be class members, and the number determined not to be class members; and

(g) the number of class members who are former recipients of Title II benefits who have verified their addresses and the number for whom checks have been certified to the Treasury; and

(i) the number of cases that have been scheduled for hearings, and the number of hearings that have been conducted; and

(j) the number of redeterminations of applications that result in allowances, the number that result in denials, and the number of redeterminations of termination cases that result in allowances and the number that result in terminations.

18. The Secretary may petition the Court at any time for relief from any one or more of the provisions of paragraph 17 above. Such relief shall be granted upon a showing made by the Secretary and a determination of the Court that the implementation of this order is proceeding smoothly and that the information called for in the particular provision or provisions from which the Secretary seeks relief is no longer needed or upon a showing and a determination of the Court that such relief is otherwise appropriate.

19. Nothing in this order shall be construed as precluding members of the plaintiff class from obtaining greater relief on alternative grounds. Class members shall retain all rights to administrative and judicial review of decisions made as a consequence of this order. Nothing in this order shall be construed as

precluding class members who choose to proceed with their individual court cases from seeking preliminary relief in those cases.

DATED: NEW YORK, NEW YORK

July 25, 1984.

/s/ Morris E. Lasker
United States District Judge

ATTACHMENT A

SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME APPLICANTS, THEIR REPRESENTATIVES AND REPRESENTATIVE PAYEES

Date: _____

Based on our review of your file, it appears that you may have been denied benefits because we found that your medical condition was not severe. A federal court has temporarily ordered us not to deny benefits on that ground and to reopen and redetermine certain applications denied on that ground.

If we review your case, we will need more information from you. Therefore, you should go to or telephone your local Social Security Administration office and be prepared to give them information about your employment history. If you go to your local Social Security Administration office in person, please bring this notice with you.

If we redetermine your application, our decision will be based upon the medical evidence that we now have in your file unless you give us additional medical evidence. If you believe that your medical condition has changed since we last evaluated your claim, you should make a special effort to obtain and give us additional medical evidence from your doctor(s) and any clinics or hospitals where you have received treatment.

IT IS IMPORTANT THAT YOU CONTACT YOUR LOCAL SOCIAL SECURIY ADMINISTRATION OFFICE RIGHT AWAY

We will try to redetermine your case right away. If you have already had a hearing, a new hearing should be scheduled within 45 days of the date appearing above unless we decide to give you benefits. If you have not yet had or asked for a hearing, you should get a new decision from us about a month after you provide us with information on your employment history. If you do not receive a hearing date, or a new decision in your case within these time periods you should go to your local Social Security office again.

IF YOUR CASE IS IN FEDERAL COURT, PLEASE SEE THE NEXT PAGE.

ATTACHMENT A (SECOND PAGE)

PERSONS WITH CASES IN FEDERAL COURTS

If you have an action pending in federal court based upon the denial of your application, we cannot redetermine your application unless and until the Court sends your case back to us. You, of course, have the right to continue with your court action. We therefore request that you indicate below whether you want to send your case back to us for redetermination. Please place your name, your signature, your social security number and the date in the spaces provided. Please tear off the form below and return in the enclosed addressed, postage-paid envelope within 20 days after the date you receive this notice. If we do not hear from you within 30 days of the notice, we will assume that you do not want to con-

tinue with your court action, and we will ask the Court to send your case back to us for redetermination.

Date: _____

_____ I want to continue my court action. I do not want the Social Security Administration to redetermine my application for benefits.

_____ I do not want to continue with my court action. I want the Social Security Administration to redetermine my application for benefits.

NAME: (Please Print) _____

SIGNATURE: _____

SOCIAL SECURITY NO.: _____

ADDRESS: (Please Print) _____

TELEPHONE NUMBER: _____

DATE: _____

ATTACHMENT B

SOCIAL SCURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME RECIPIENTS, THEIR REPRESENTATIVES AND REPRESENTATIVE PAYEES

Date: _____

Based on our review of your file, it appears that your benefits may have been terminated because we found that your medical condition was not severe. A federal court has temporarily ordered us not to terminate benefits on that ground and to reinstate benefits that were terminated for that reason. After we reinstate your benefits, we have the right to review your entitlement to benefits.

IT IS IMPORTANT THAT YOU CONTACT YOUR SOCIAL SECURITY ADMINISTRA-TION OFFICE RIGHT AWAY. IF YOU WERE RECEIVING SUPPLEMENTAL SECURITY INCOME BENEFITS, PLASE BE PREPARED TO GIVE US INFORMATION ABOUT YOUR INCOME, RESOURCES AND LIVING ARRANGEMENTS.

We will not start paying you benefits until you verify your address. If you were receiving Supplemental Security Income benefits, you must also show that you continue to be financially eligible for those benefits. You should receive your first check about a month after you verify your address and eligibility. If you do not start getting your benefits within that time, you should go to your local Social Security office again and let them know that you did not get your check.

IF YOUR CASE IS IN FEDERAL COURT, PLEASE SEE THE NEXT PAGE

ATTACHMENT B (second page)

PERSONS WITH CASES PENDING IN FEDERAL COURT

If you have an action pending in federal court based upon the termination of your benefits, your case must be sent back to us for reevaluation before we will reinstate your benefits. Therefore, we would like to ask the Court to send your case back to us for reevaluation. You, of course, have the right to continue with your court action, but if you do we will not reinstate your benefits unless and until the Court orders us to. We therefore request that you indicate below whether you want to send the case back to us for reevaluation. Please place your name, your signature, you social security number, your address, your telephone number and the date in the spaces provided. Please tear off the form below and return it in the enclosed addressed, postage-paid envelope within 20 days after the date you receive this notice. If we do not hear from you within 30 days of the date of this notice, we will assume that you do not want to continue with your court action, and we will ask the Court to send your case back to us for reevaluation.

Date: _____

_____ I want to continue with my court action. I do not want the Social Security Administration to reevaluate the termination of my benefits.

_____ I do not want to continue with my court action. I want the Social Security Administration to reevaluate the termination of my benefits.

NAME: (Please Print) _____

SIGNATURE: _____

SOCIAL SECURITY NUMBER: _____

ADDRESS: (Please Print) _____

_____

TELEPHONE NUMBER: _____

ATTACHMENT C

DIXON APPLICATION

Date: _____

This acknowledges presentment on this date of your claim the relief under DIXON v. HECKLER. If you are a member of the class of plaintiffs in this lawsuit and are entitled to relief, the Social Security Administration will be reviewing your application if you were denied benefits or reinstating your benefits if your benefits were terminated. If you have an action pending in federal Court, your action must be sent back to us before we will review your application or reinstate your benefits.

NAME: (Please Print) _____

SOCIAL SECURITY NUMBER: _____

ADDRESS: (Please Print) _____

_____

TELEPHONE NUMBER: _____

ATTACHMENT C (BACK OF NOTICE)

The class of plaintiffs in *DIXON v. HECKLER* includes people who:

1. Were denied or terminated from disability benefits on or after July 20, 1983 or had an appeal pending on that date; *and*
2. Were denied or terminated because the Social Security Administration found that their medical condition was "not severe" or did not "significantly

limit physical or mental abilities to do work activities".

We will decide whether you are a member of the class of plaintiffs in *DIXON v. HECKLER* within about two weeks of the date of this notice.

If you are a member of the class of plaintiffs in *DIXON v. HECKLER*, and your application was denied, the Social Security Administration will be reviewing your application. You may have to provide more information about your employment history. If you have already had a hearing, a new hearing should be scheduled within 30 days of the day we decide that you are a class member, unless we decide to give you benefits before then. If you have not yet had or asked for a hearing, you should get a decision from us about a month after you provide us with information on your employment history.

If you are a member of the class of plaintiffs in *DIXON v. HECKLER* and your benefits were stopped, your benefits should be reinstated. If you were receiving SSI benefits, you must show that you continue to be financially eligible for SSI benefits. You should receive your first check about a month after we verify your eligibility.

If you do not get a decision whether you are a *DIXON v. HECKLER* or you do not get a new hearing, a new decision, or your benfits within the above time periods, you should contact your Social Security Administration office.

ATTACHMENT D

SOCIAL SECURITY DISABILITY AND SUPPLEMNTAL SECURITY INCOME DISABILITY APPLICANTS AND RECIPIENTS

HAS THE SOCIAL SECURITY ADMINISTRATION DENIED OR TERMINATED YOUR DISABILITY BENEFITS? IF SO, YOU MAY BE ENTITLED TO MONEY OR A NEW REVIEW OF YOUR CASE

Because of a lawsuit, the Social Security Administration may have to reinstate your benefits or reevaluate your application for benefits. The lawsuit affects people in the State of New York who were denied benefits or were terminated because the Social Security Administration found that their medical condition was not severe.

CAN YOU ANSWER YES TO THESE QUESTIONS?

1. Were you denied or terminated from Disability benefits on or after July 20, 1983 or did you have an appeal pending on that date?

2. Do you think your benefits were denied or terminated because the Social Security Administration found that your medical condition was "not severe" or because it found that your medical condition did not "significantly limit your physical or mental abilities to do basic work related activities?"

If you said yes to both of the above questions, don't delay. Contact your local Social Security office immediately. Be prepared to give them your name, social security number, current address and telephone number. Ask for a *DIXON APPLICATION.*

APPENDIX F

ENDORSEMENT

DAVID DIXON, et al., Plaintiffs and THE STATE OF NEW YORK, et ano., Plaintiff-Intervenors v. MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, 83 Civ. 7001(MEL)

EULALIA TEREZ, etc., Plaintiff v. MARGARET M. HECKLER, etc., Defendant. 83 Civ. 8264(MEL)

CARMEN FELICIANO, etc., Plaintiff v. MARGARET M. HECKLER, etc., Defendant. 83 Civ. 8609(MEL)

TOMASINA GONZALEZ, etc., Plaintiff v. MARGARET M. HECKLER, etc., Defendant. 84 Civ. 110(MEL)

LASKER, D.J.

The Secretary of the Department of Health and Human Services moves for an order vacating the portion of this court's order of July 26, 1984 which enjoins the use of the Secretary's severity regulations and which requires that the Secretary re-process the claims of class members without reliance on the severity regulations. The plaintiffs and plaintiff-intervenors oppose.

The Secretary's motion is predicated on the argument that Section 4(a)(1) of the so-called Reform Act (Public Law 98-460 signed October 9, 1984) undermines the ruling of the court because it constitutes legislative ratification of the severity regulations.

Section 4(a)(1) of the Reform Act amended Section 223(d)(2) of the Act, 42 U.S.C. § 423(d)(2), by adding a new subparagraph (C), which reads:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

On the basis of the legislative history of this provision, too lengthy to repeat here,[1] the Secretary argues that by its passage, and by Congress' failure explicitly to repeal the Secretary's severity regulations, Congress intended to ratify the severity regulations. We disagree and find more persuasive the plaintiff and plaintiff-intervenors' arguments that Congress did not intend, as stated by Judge Garcia in *Smith v. Heckler*, Civ. No. S-83-1609 EJG (E.D. Ca. May 1, 1985) and Judge Garrity in *McDonald v. Heckler*,

---

[1] We say "too lengthy to repeat" because many courts have already gone through this exercise. Courts which have reviewed this legislative history and which have concluded that the severity regulations have not been ratified by the Act include: *McDonald v. Heckler*, Civil Action No. 84-2190-G (D. Mass. June 27, 1985); *Smith v. Heckler*, Civ. No. S-83-1609 EJG (E.D. Ca. May 1, 1985); *Johnson v. Heckler*, 83 C 4110 (N.D. Ill. Dec. 17, 1984); *Mason v. Heckler*, Civil Action No. 83-390 (D. Vt. Mar. 20, 1985) (Magis. Ct.); *contra Elliott v. Heckler*, No. 84-2055 (10th Cir. April —, 1985); *Hall v. Heckler*, No. C-84-2932-WWS (N.D. Ca. Feb. 11, 1985); *Hall v. Heckler*, No. 84-5152 (W.D. Ark. Jan. 8, 1985) (Magis. Ct.).

Civil Action No. 84-2190-G (D. Mass. June 27, 1985) to validate the Secretary's severity policies.

We agree with Judge Garrity's observation that:

> The language of the new subsection added by the 1984 Act does no more than require that the Secretary discontinue her policy of refusing to consider the combined effect of non-severe impairments. Furthermore, the Conference Committee rejected the language of the Senate Finance Committee Report which expressed some support for the Secretary's severity policies. While the Conference Committee Report endorses the Secretary's sequential evaluation process, it does not validate the severity test used by the Secretary.

For the reasons indicated, the Secretary's motion to vacate portions of the court's order of July 26, 1984 and granting a stay of discovery is denied.

It is so ordered.

Dated: New York, New York
July 22, 1985

MORRIS E. LASKER
U.S.D.J.

STATUTORY A
PROVISION

1. Section 223(d)(1)
cial Security Act, as cod
II) 423(d)(1)(A) and (

(d) "Disability" define
(1) The term "disabili
(A) inability to engag
activity by reason of a
physical or mental imp
pected to result in death
be expected to last for
less than 12 months; * * *

* *

(2) For purposes of pa

(A) an individual (ex
vorced wife, or widowe
402(e) or (f) of this titl
under a disability only i
pairment or impairments
is not only unable to do
not, considering his age
perience, engage in any
gainful work which exis
regardless of whether s
mediate area in which he
job vacancy exists for hi
hired if he applied for
preceding sentence (with
"work which exists in th
work which exists in si

NDIX G

D REGULATORY
S INVOLVED

A) and (2)(A) of the So-
ied at 42 U.S.C. (& Supp.
)(A), provides:

l

y" means—
in any substantial gainful
ny medically determinable
irment which can be ex-
or which has lasted or can
continuous period of not

* * *

ragraph (1)(A)—

ept a widow, surviving di-
for purposes of section
) shall be determined to be
his physical or mental im-
are of such severity that he
his previous work but can-
education, and work ex-
other kind of substantial
s in the national economy,
ch work exists in the im-
lives, or whether a specific
n, or whether he would be
work. For purposes of the
respect to any individual),
national economy" means
nificant numbers either in

the region where such individual lives or in several regions of the country.

2. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 223(d)(2)(C) of the Social Security Act, as added by Section 4(a)(1) of the Social Security Disability Benefit Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800 (42 U.S.C. (Supp. II) 423(d)(2)(C)), provides:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

4. Section 1614(a)(3)(G) of the Social Security Act, as added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800 (42 U.S.C. (Supp. II) 1382c (a)(3)(G)), provides:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

5. 20 C.F.R. 404.1520 and 404.1521 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not

doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a deci-

sion based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

6. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an

impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find your disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).
[50 FR 8728,, Mar. 5, 1985]

§ 416.921. What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Bacis work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

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No. 86-2

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

OTIS R. BOWEN, as Secretary of Health and Human Services,
Petitioner,

vs.

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, EULALIA TEREZ, CARMEN FELICIANO, and TOMASINA GONZALEZ, individually and on behalf of all others similarly situated,
Plaintiffs-Respondents,

—and—

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services,
Plaintiffs-Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 86-2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, as Secretary of Health and Human Services,

Petitioner,

vs.

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, EULALIA TEREZ, CARMEN FELICIANO, and TOMASINA GONZALEZ, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

—and—

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services,

Plaintiffs-Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioner, the Secretary of Health and Human Services, requests that his petition for writ of certiorari be held pending the Court's decision in *Bowen v. Yuckert, cert. granted*, 54 U.S.L.W. 3573 (May 20, 1986) (No. 85-1409). (Pet. at 13). This request should be denied because the issue on which the Secretary sought and obtained review in *Yuckert* has no bearing on the validity of the preliminary injunction in this case.

In *Yuckert*, the Secretary represented to this Court that there was no need for a factual record regarding the issues in that case because *Yuckert* raised solely the facial validity of the severity regulation that the Secretary describes as a *de minimis* screening device. (*Yuckert* Reply Br. at 4). Because this case challenges the Secretary's practices in implementing the severity regulation, resolution of the issue the Secretary presents in *Yuckert* will not dispose of the issues presented here. Indeed, every court of appeals that has considered the question has recognized that the legality of a severity rule that operates as more than a *de minimis* screening device is a wholly separate question from the facial validity of a *de minimis* rule permitting screening of claims without full vocational evaluations. These courts have all held that the Secretary cannot deny benefits on medical grounds alone with a rule that is not *de minimis*. In this case, the District Court made a preliminary finding that, in practice, the Secretary applies the severity regulation as more than a *de minimis* threshold, and this finding has not been challenged on appeal. Accordingly, the judgment below will stand regardless of this Court's disposition of *Yuckert*.

Furthermore, the preliminary stage of the proceedings in this case strongly counsels against reviewing or vacating the injunction issued below. At this stage, the parties have not yet completed discovery and the District Court has neither made final factual findings nor crafted the terms of a final injunction. As this case proceeds to trial on the merits, the Secretary will have ample opportunity to introduce any relevant evidence and to propose any appropriate form of injunction, should the District Court find that the Secretary's practices conflict with the Social Security Act. The Secretary has made no showing that he would be prejudiced by awaiting such resolution in the District Court. Indeed, the Secretary made no showing to the District Court that he would be harmed by issuance of the preliminary injunction, has never sought a stay of the injunction, and has never challenged the District Court's finding that the preliminary injunction is necessary to prevent irreparable harm to the plaintiff class. Accordingly, certiorari should be denied at this stage in this litigation and the preliminary injunction should not be disturbed.

COUNTERSTATEMENT OF THE CASE

In his appeal to the Second Circuit and his petition to this Court, the Secretary has not challenged the District Court's findings of fact. His statement of the case, however, ignores the District Court's central factual findings as well as the evidence before the District Court. Due to the early stage of the proceedings, the facts have not yet been fully developed. Those facts are nonetheless of central importance to the question whether this petition should be held and summarily disposed of as the Secretary suggests. Accordingly, respondents shall set forth the facts as currently reflected in the record.

1. The Social Security Act ("the Act") provides that a person is considered disabled if he is unable "to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or...to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). The Act explains that "for purposes of" applying this definition, a person "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...." 42 U.S.C. § 423(d)(2)(A). The Act further provides that a "physical or mental impairment" is an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques." 42 U.S.C. § 423(d)(3). All twelve courts of appeals have interpreted the Act to provide that if a claimant demonstrates that he has a physical or mental impairment that prevents him from returning to his past work, he meets his *prima facie* burden of proving disability. *Johnson v. Heckler*, 769 F.2d 1202, 1210 (7th Cir. 1985) (citing cases), *petition for cert. filed*, 54 U.S.L.W. 3600 (March 11, 1986) (No. 85-1442).

2. In this case, plaintiffs challenge the Secretary's regulations and practices under which disability claims are denied on medical

grounds without any consideration of the claimant's ability to perform past work or other work in light of both medical and vocational factors. In support of their motion for a preliminary injunction, respondents submitted evidence to the District Court showing that the Secretary had deliberately instituted a harsher standard for denying disability claims after a review of medical factors alone while publicly proclaiming that his severity regulation was merely a *de minimis* mechanism for screening out frivolous claims.

3. From 1960 to 1978 the Secretary's regulations provided that if a claimant had a medically determinable impairment, the claim could be denied on medical grounds alone only if the impairment was a "slight neurosis, slight impairment of sight or hearing or other similar slight abnormality or combination of abnormalities." 25 Fed. Reg. 8100 (Aug. 24, 1960). Under this regulation, an impairment would not be denied as slight if it, in fact, prevented the claimant from returning to past work. (J.A. 659[1]).

4. In 1978, the Secretary altered these regulations to provide that a claim could be denied on medical grounds alone if the impairment was "not severe." In introducing this language, the Secretary announced in the Federal Register that the term "not severe" was not intended to alter the standard for denying claims on medical grounds alone. 43 Fed. Reg. 9296 (Mar. 7, 1978); 43 Fed. Reg. 58353 (Nov. 28, 1978).

5. Although the Secretary stated publicly that substitution of the term "not severe" for the term "slight" was not a change in standard, the uncontroverted evidence before the District Court shows that he secretly implemented a new harsher standard for screening out disability claims on medical grounds alone. In 1976, two years prior to issuance of the "not severe" regulation, the Secretary began returning large numbers of cases to State disability determination services, which perform initial determinations of disability. These "quality assurance" returns required denial of claims as not severe that would not have been denied on

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[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals, a copy of which has been lodged with this Court.

medical grounds alone under prior standards. (Affidavit of Marvin Lachman, dated March 23, 1984, J.A. 275-319).

6. Both the New York Disability Determination Service and other state disability services protested that these returns reflected a heightened standard. In response, Robert Bynum, Associate Commissioner for the Office of Program Operations of the Social Security Administration, sent a memorandum to all regional commissioners informing them that the agency was departing from a "slightness" standard and would be adopting regulations under which a claim could be denied when an impairment was not severe. (Memorandum to All Regional Commissioners from Robert Bynum, January 14, 1977, J.A. 648-51).

7. After the Secretary issued the "not severe" regulations in 1978, he sent state adjudicators a list of impairments that must always be considered not severe. This list was included in an internal manual entitled the Program Operations Manual System ("POMS"); it was not published and was not subjected to notice and comment rule making. The list included impairments that would clearly prevent some claimants from returning to past work. For example, a colostomy was listed as a "not severe" impairment. Martha McSteen, then Regional Commissioner for the Dallas Region, relayed comments that most surgeons would not allow their patients to lift more than fifty pounds following surgery. (J.A. 700). Under the Secretary's Medical Vocational Guidelines, the Secretary has taken administrative notice that a person with such a limitation cannot perform substantial gainful activity if he has a history of more strenuous labor, and also suffers from an adverse vocational profile. *See* 20 C.F.R. Part 404, Appendix 2. Nonetheless, the manual instructions required a denial of benefits to all persons with the designated medical impairments.

8. In 1980, the severity regulation was rewritten to specify basic work activities that would have to be "significantly limited" in order to constitute a severe impairment. Commenting on these regulations at the time they were issued, the Appeals Council—the Social Security Administration's highest adjudicative body—

stated that the regulations were inconsistent with the Secretary's stated position that the 1978 regulations did not represent a changed standard. The Appeals Council noted that if an impairment significantly limited the capacity to understand simple instructions, for example, the claimant would be so seriously limited that he probably could not perform any substantial gainful activity even if there were no adverse vocational factors. (J.A. 667, 671).

9. When the 1980 regulations were published in final form, the Secretary stated in response to public comments that the 1978 introduction of the severity regulation constituted an expansion of the prior regulation permitting denial on medical grounds in cases of slight impairments. (Pet. App. 38a). The Secretary stated that he intended to study the efficiency of the new severity regulation. The Secretary did not revise the proposed regulation in response to the Appeals Council's comments.

10. Following promulgation of the 1980 revisions to the severity regulations, the Secretary issued two internal rulings designed to enforce the heightened not severe standard on administrative law judges and the Appeals Council. The first ruling, SSR 82-55, listed twenty impairments that must always be treated as not severe. The second ruling, SSR 82-56, made clear that an impairment could be treated as not severe even if it prevented the claimant from returning to his past work. Under 20 C.F.R. § 422.408, these rulings were binding on adjudicators at all levels of the administrative process.

11. To enforce these new rules, the Secretary conducted "refresher courses" for administrative law judges. These courses gave examples of claimants who should be denied as having "not severe" impairments. One example is of a woman with a tortuous aorta and documented narrowing of the two coronary arteries. She had been diagnosed as having atypical angina and hypertensive cardiovascular disease with coronary insufficiency. SSA's own consultative physician stated that she should not lift over 25 pounds. On these facts, the "refresher course" instructed that the

claim should be denied as not severe. Once again, this result squarely conflicts with the Medical Vocational Guidelines, which take administrative notice that a person with the described limitations and an adverse vocational profile cannot engage in substantial gainful activity. (J.A. 760-62).

12. The Secretary's heightened standard for denying claims on medical grounds alone resulted in a vast increase in claims denied without any consideration of whether the claimant could perform past work or any other work. Between 1975, when the Secretary last applied a "slightness" standard, and 1982, when he published his initial list of twenty "not severe" impairments, the percentage of claims denied on medical grounds alone climbed from 8 to 40 percent. (Pet. App. 37a).

13. On August 23, 1983, a Social Security Administration workgroup issued an internal report on the severity regulation. The report concluded:

> Whatever SSA's actual conception of the minimum impairment level was for policy purposes between 1975 and the present, its *application* of the concept in deciding cases suggests a change of position. Yet, at the same time, there was no corresponding change in the statute and, in fact, SSA itself stated that the regulations did not constitute a change of standard.

(J.A. 620).

PROCEEDINGS BELOW

14. On February 17, 1984, plaintiffs filed a motion for a class-wide preliminary injunction barring the Secretary from relying on the severity regulation to deny disability claims in New York State. On March 15, 1984, the State of New York and Cesar Perales, Commissioner of the New York State Department of Social Services, moved to intervene as party plaintiffs.

15. On June 22, 1984, District Judge Morris E. Lasker issued a preliminary injunction temporarily enjoining application of the

severity regulation in the State of New York and requiring the Secretary to reprocess claims that were pending as of the date the complaint was filed. Judge Lasker also granted plaintiffs' motion for class certification and the State plaintiffs' motion for intervention.

16. Judge Lasker based his preliminary injunction order on alternative grounds. First, he rejected the Secretary's argument that 42 U.S.C. § 423(d)(2)(A) sets out an independent severity requirement separate from an analysis of the person's ability to engage in substantial gainful activity in light of medical and vocational factors. Judge Lasker found that the Secretary's interpretation constituted a substantive rewriting of the statute, which on its face requires that impairments be evaluated in light of vocational characteristics. (Pet. App. 34a). Judge Lasker found unpersuasive the argument that the 1967 amendments to the Social Security Act, which introduced the term "severity," indicated any intention on the part of Congress to establish an independent severity test in which the interaction of medical and vocational factors could be ignored. Judge Lasker noted that when Congress wished to permit the denial of benefits based on a predetermined level of severity, it did so expressly, as in the case of disabled widows. The contrast between the two statutory definitions provided strong evidence that Congress intended an individualized assessment of medical and vocational factors for disabled workers. (Pet. App. 41a-42a). Furthermore, by disregarding vocational considerations altogether, the severity regulation violated longstanding case law providing that a claimant establishes a *prima facie* case of disability by demonstrating an inability to return to his former work. Judge Lasker observed that "[t]he Secretary does not argue that [Second] Circuit's precedents regarding the allocation of the burden of proof are incorrect, but neither does she suggest how they can be reconciled with the severity regulation." (Pet. App. 43a-44a).

17. Judge Lasker also rejected the Secretary's argument that on its face and as applied the severity requirement is merely a *de minimis* screening mechanism designed to improve efficiency in the adjudication of disability claims. Even assuming that

the Secretary has the authority to screen out claims involving impairments which are *de minimis*, and without consideration of vocational factors, Judge Lasker concluded that the severity regulation does not set such a standard, either as written or as applied. First, he noted that the language of the severity regulation on its face is not *de minimis*. (Pet. App. 34a-35a). Second, he considered the facts of the named plaintiffs and found that none of the named plaintiffs' impairments could be considered *de minimis*. (Pet. App. 36a-37a). Third, Judge Lasker looked to the rate at which claims were denied under the severity regulation and the Secretary's prior rules permitting denial of benefits in cases of slight impairments. Noting the dramatic increase in denials, Judge Lasker commented that "it would be absurd to assume that the change in the regulations has not played a substantial part in it." (Pet. App. 37a). Judge Lasker considered the Secretary's own public statement in 1980 that he had "expanded" the severity regulation in 1978 in order to limit the number of cases in which vocational factors would be considered. Judge Lasker found unpersuasive the Secretary's argument that this statement did not indicate an intent to limit entitlement. He wrote:

> [T]here can be no blinking the Secretary's 1980 statement that the regulation *was* intended to "limit[] the number of cases" in which vocational factors would be considered—something which, it would appear, can only be accomplished by increasing the number of cases decided on medical grounds alone.

(Pet. App. 38a).

18. Judge Lasker considered the appropriate scope of preliminary relief. Based on his finding that the Secretary was systematically denying disability benefits in violation of the Social Security Act, Judge Lasker enjoined the Secretary from relying on the policies in the severity regulation and rulings to deny benefits. (Pet. App. 54a). In addition, Judge Lasker ordered the Secretary to re-evaluate the claims of class members whose cases were pending on the date the complaint was filed, since individual

appeals would merely delay evaluation under proper standards. The Secretary did not argue for an alternative form of injunction.[2]

19. Following passage of the Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, *et seq.*, the Secretary moved to vacate the District Court's injunction against use of the severity regulation on the ground that Congress had expressed approval of an independent medical severity threshhold. Plaintiffs argued in their opposition papers that nothing in the Reform Act sanctioned an independent severity test and that, at most, Congress may have indicated approval of *de minimis* efficiency measures that eliminate only meritless claims. Plaintiffs presented additional evidence obtained during discovery to establish that the standard embodied in the severity regulation is not a *de minimis* one. The Secretary presented no contrary evidence. Ruling on the Secretary's motion to vacate, Judge Lasker held that nothing in the Reform Act or its legislative history sanctioned the severity test employed by the Secretary.

20. The Secretary next appealed to the United States Court of Appeals for the Second Circuit. In his brief on appeal, the Secretary drew the court's attention to Social Security Ruling (SSR) 85-28, which was issued during the pendency of the appeal. The Secretary argued that SSR 85-28 demonstrated that the severity regulation eliminated from consideration only *de minimis* impairments. The Secretary also informed the court that a prior ruling, SSR 82-55, listing impairments that would always be treated as not-severe had been "obsoleted." Plaintiffs objected that it was unclear from the face of SSR 85-28 whether it would, in fact, operate as a *de minimis* screening mechanism and that, in any event, the District Court should be given an opportunity to review the ruling to determine whether it constituted such a clear abandonment of past practices as to provide a basis for modifying the injunction. Plaintiffs also submitted evidence to the Court of Appeals indicating that the Secretary was continuing

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[2] The Secretary's proposed order only challenged certain time limits and technical procedures for administering the order, which are not at issue in this appeal.

to apply examples such as those in the "obsoleted" SSR 82-55.[3] Plaintiffs invited the Secretary to make a motion to modify the injunction to the District Court which would be in a position to review all of this evidence. The Secretary has made no such motion.

21. On March 6, 1986, the United States Court of Appeals for the Second Circuit affirmed the District Court's preliminary injunction. The panel noted that the Secretary had not challenged the District Court's factual findings, the form of the injunction or plaintiffs' demonstration of irreparable harm. The panel concluded that plaintiffs had shown a likelihood of success in showing that the severity regulation operates in a manner violative of the Social Security Act. The panel did not address the issues raised by SSR 85-28, thereby leaving the Secretary free to pursue any appropriate relief in the District Court.

REASONS WHY THE PETITION SHOULD BE DENIED

A. *Resolution of* Yuckert *in the Secretary's Favor Would Not Dispose of the Issues Presented Here.*

The Secretary's argument that the petition here should be held and disposed of in light of the Court's decision in *Yuckert* rests on the conclusory assertion that "[i]f the Court sustains the validity of the severity regulation in *Yuckert*, the preliminary injunction must be reversed." (Pet. at 12-13). This assertion is disingenuous in light of the Secretary's own statements to this Court in *Yuckert*. In response to Yuckert's argument that the absence of an adequate factual record in that case made review inappropriate, the Secretary assured the Court that "there is no need for factual development," because:

> *[t]he only issue before this Court is whether the severity regulation is invalid on its face.* That is a question of law, and as respondent concedes, "[t]he Ninth

[3] *See* Addendum to Brief for Plaintiffs-Appellees and Plaintiffs-Intervenors-Appellees, submitted to the Court of Appeals, at 109.

> Circuit's analysis is based on solely legal grounds." *If the Court sustains the regulation against respondent's facial challenge, questions regarding its application in particular factual circumstances can be resolved as they arise.*

Yuckert Reply Br. at 4 (emphases added).

The Secretary cannot have it both ways. Having sought review in *Yuckert* by claiming that the case only presented the issue of the severity regulation's facial validity, he cannot now claim that a decision in that case will dispose of fact-based challenges to his application of the severity regulation. Indeed, the Secretary expressly conceded that "questions regarding [the severity regulation's] application" fall outside the scope of his appeal in *Yuckert*. *Id.*

Resolution of the instant case turns upon just such factual questions concerning the regulation's application. To be sure, the District Court below held that plaintiffs had established a likelihood of demonstrating the facial invalidity of the severity regulation.[4] But the District Court carried its analysis further, assumed the legality of a *de minimis* severity step, and, based on the "clear evidence" before it, found that the Secretary was systematically applying the severity test as an independent barrier to eligibility, not simply as a *de minimis* screening device for weeding out meritless claims. (Pet. 36a-38a; 44a). Thus, even if the Secretary fully achieves the result he seeks in *Yuckert* - this Court's agreement that he may apply his severity regulation to "screen out" those claimants whose impairments are so minimal that they "would be found not to be disabled at subsequent steps

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[4] It should be noted here that the Secretary's sole quarrel with the Ninth Circuit's judgment in *Yuckert* is that it purportedly prohibits any threshold severity step, even a *de minimis* step. (*Yuckert* Pet. at 7-11; 19-24). Although one ground supporting the preliminary injunction here was that plaintiffs had demonstrated the likelihood that the severity regulation facially conflicts with the Social Security Act, the judgments below in no way bar the Secretary from ever instituting a truly *de minimis* medical threshold test. (*See* Pet. 12a-15a; 36a-39a; 54a).

of the sequential evaluation process in any event" (*Yuckert* Pet. at 23-24) – the preliminary injunction entered below would stand on the District Court's uncontested finding that the Secretary has in fact applied the severity step not as a *de minimis* screening mechanism, but as an independent and unauthorized eligibility restriction.

B. *Regardless of the Outcome of* Yuckert, *There is No Basis for Disturbing the Court of Appeals' Ruling Upholding the Preliminary Injunction Entered by the District Court.*

As explained above, the preliminary injunction entered by the District Court rests in part on the District Court's finding that the Secretary has applied the severity regulation as an independent eligibility restriction rather than as a *de minimis* screening device. The District Court proceeded to find that plaintiffs were likely to succeed in their challenge to the Secretary's restrictive severity practices and that plaintiffs were suffering irreparable harm from these practices. On appeal to the Second Circuit, the Secretary did not challenge the District Court's findings of fact, findings of irreparable harm or the form of the injunction.[5] Applying the appropriate standard of review, the Court of Appeals upheld the preliminary injunction as a proper exercise of judicial discretion. Inasmuch as there is no real dispute as to the legal conclusions and the factual findings that support the preliminary injunction, there is no basis for either granting plenary review or summarily vacating and remanding the injunction in light of this Court's disposition of *Yuckert*.

1. The issue whether the Social Security Act permits a severity test that is more than a *de minimis* screening device is clearly not worthy of Supreme Court review. All ten circuit courts of

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[5] In this Court, the Secretary has raised some objections to the scope of the injunction, Pet. 10-12, but does not seek review of these issues. In fact, the Secretary did not seek review of these questions in the Court of Appeals and, consequently, cannot raise these questions for the first time in this forum. *See Heckler v. Campbell*, 461 U.S. 458, 468 n. 12 (1983).

appeals that have addressed the "severity" issue have held that the Social Security Act precludes a medical threshold test that permits summary denial of claims involving more than a *de minimis* or slight impairment.[6] Although these courts differ as to whether the proper remedy is to impose a narrow construction on the severity regulation or enjoin its use in its current form altogether, all have condemned the Secretary's imposition of a substantive medical threshold that bars claims of individuals who would otherwise be adjudged disabled. Moreover, the Secretary himself no longer defends the severity regulation as an independent eligibility criterion. He now defends it solely as a *de minimis* threshold, a device designed to promote administrative efficiency without denying benefits to any person whose claim would be approved after a full vocational evaluation. *Compare Stone v. Heckler*, 752 F.2d at 1103 (in which the Secretary argued that the Act and regulations mandate a stringent medical severity threshold) and *Yuckert* Pet. 22 (in which the Secretary embraces narrow judicial construction of the severity regulation as a *de minimis* threshold test).

2. The factual question whether the Secretary has applied more than a *de minimis* threshhold is not properly subject to review because it was not challenged below. Even if the Secretary had challenged this finding, however, this issue is clearly not worthy of Supreme Court review given the preliminary stage of these proceedings and the deferential standard for reviewing factual findings by lower courts. Moreover, the Secretary himself has characterized the severity regulation as more than a *de minimis*

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[6] *McDonald v. Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F.2d 36 (3d Cir. 1986); *Brown v. Heckler*, 786 F.2d 1870 (10th Cir. 1986); *Hansen v. Heckler*, 783 F.2d 170 (8th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1985), *cert. granted sub nom. Bowen v. Yuckert*, No. 85-1409 (May 19, 1986); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F.2d at 1209-13; *Evans v. Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985); *Brady v. Heckler*, 724 F.2d 914 (11th Cir. 1984).

threshold test in several court proceedings. *See, e.g., Stone v. Heckler*, 752 F.2d at 1103; *Salmi v. Secretary of Health and Human Services*, 774 F. 2d at 690; *Garza v. Heckler*, 771 F.2d 871 (5th Cir. 1985).

3. The District Court's ruling on the form of the injunction also was not challenged before the Court of Appeals and consequently cannot be raised here for the first time. Even if this issue had been preserved, it is clear that the District Court acted well within its authority. Judge Lasker had before him substantial uncontroverted evidence that the Secretary interpreted and applied his severity regulation as a harsh substantive standard that denied benefits to claimants who were in fact disabled. The injunction properly enjoins continued screening of disability claims based on these policies, (Pet. App. 70a), and requires readjudication of claims which were improperly rejected under the enjoined policies.[7]

4. The issuance of Social Security Rulings 85-28 and 86-8 and the "obsoletion" of Social Security Ruling 82-55 following entry of the preliminary injunction also provide no basis for disturbing the preliminary injunction. These administrative actions raise serious factual questions that are best resolved by the District Court prior to any consideration by the Court of Appeals or this

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[7] In criticizing (without seeking review of) the class certification order, the Secretary seriously mischaracterizes the decision below. Judge Lasker explicitly relied on both harm to the class and the futility of exhaustion in justifying a waiver of exhaustion requirements. (Pet. App. 29a-30a). Moreover, the issue of exhaustion in this case is similar to that in *Bowen v. City of New York*, 54 U.S.L.W. 4536 (U.S. June 2, 1986). Both cases concern a policy denying claimants their right to a full sequential evaluation pursuant to a rule initially implemented through quality assurance returns and actively hidden from public view. Finally, the Secretary erroneously suggests that the order below requires payment of benefits to persons who are not disabled. The injunction does nothing to change the standard for determining disability. It only prevents the illegal screening out of meritorious claims. The Secretary's reliance on *Heckler v. Redbud Hospital District*, 54 U.S.L.W. 3027 (U.S. July 30, 1985) is misplaced. In *Redbud*, Justice Rehnquist stayed a preliminary injunction requiring issuance of nationwide regulations. He left in place those provisions of the preliminary injunction requiring application of proper standards in determining reimbursement rates.

Court. All of these factual issues will be considered by the District Court when it rules on the merits and fashions a final injunction.

First, the policies stated in the rulings are ambiguous. In particular, the rulings do not clearly abandon the Secretary's prior practice of refusing to consider past work. Instead, they promise to consider past work only when the work was "unique." Courts disagree as to whether this language actually embraces the rule of all twelve circuits that a claimant makes out a *prima facie* case by showing an inability to return to past work. *Compare McDonald v. Secretary of Health and Human Services*, 795 F.2d at 1125, *with Hansen v. Heckler*, 783 F.2d at 175. The meaning of the Secretary's new rulings should be determined in the District Court following review of the Secretary's instructional material, quality assurance returns, and other factual matters. This inquiry is especially important since the new rulings assert that they are merely restating the policy that has always been in place. (*Yuckert* Pet. 40a).

Second, as in any case in which a court is asked to permanently enjoin practices that may have been abandoned in the course of litigation, the District Court must consider any evidence that the Secretary proffers showing that he has abandoned his illegal past practices and is unlikely to return to them following vacatur or modification of the injunction. *See City of Mesquite v. Aladdins's Castle, Inc.*, 445 U.S. 283, 289 & n.10 (1982). In this case, the District Court must consider the ease with which the Secretary may issue and formally "obsolete" Social Security Rulings and the Secretary's past pattern of stating one rule publicly while implementing another internally. The District Court would also consider the relevance of the Secretary's failure to employ formal rulemaking procedures, in light of his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C. § 421(k)(2).[8] These matters may be best addressed

[8] As this Court noted in *Heckler v. Campbell*, 461 U.S. at 470, formal rulemaking provides an essential procedural safeguard when the Secretary seeks to

(Footnote Continued)

by the District Court on an appropriate motion or following a trial on the merits. Indeed, the Court of Appeals specifically noted that in fashioning final relief after trial, the District Court should consider whether there were appropriate methods for narrowing the scope of the injunction. (Pet. App. 15a). Changes in the Secretary's practices, if any, would surely be considered at that stage. At this stage in the litigation, none of these facts or legal questions have been considered below and they are therefore not properly presented for review by this Court.

C. *The Secretary Has Made No Showing That He Would Be Prejudiced By Awaiting a Final Trial on the Merits.*

Because the injunction entered below is a preliminary injunction, the Secretary remains free to present any additional facts or arguments at the final trial on the merits. In addition, the Secretary may return to the District Court to present any proposals for modification of the injunction. The Secretary has made no showing either to this or any other court, that he would be prejudiced by pursuing his claims in that forum.[9] In contrast, vacatur of the injunction would remove protections ordered by the District Court and cause harm to members of the plaintiff class.

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dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "not severe" impairments to this process. He suggests that a non-expert can simply guess on a case-by-case basis whether an impairment would prevent anyone from engaging in substantial gainful activity, irrespective of age, education, and work experience.

[9] The Secretary presented no evidence to the District Court suggesting that he would be harmed by entry of a preliminary injunction and did not seek a stay from the injunction. Indeed, the injunction, which has been in effect for two years, does not prevent the Secretary from denying benefits to anyone who fails to meet the Act's criteria for evaluating disabilities. It only precludes use of an alleged "screening" device that the District Court found to be a harsh substantive standard causing irreparable harm to the plaintiff class.

1. The Secretary erroneously suggests that the injunctive relief to class members whose claims were previously adjudicated is not relevant to the disposition of his petition because this relief "is now being accomplished" and that, in any event, some class members may be entitled to readjudications under the Disability Benefits Reform Act of 1984. (Pet. 12 n.5). Most class members, however, do not fall within the narrow scope of the Reform Act's provisions. Moreover, the relief ordered below "is now being accomplished" only as a result of the injunction below. If the injunction were reversed, these class members would lose their rights to an immediate readjudication.[10] This result would be clearly wrong since the Secretary no longer disputes that these class members' claims were originally adjudicated improperly. Indeed, the Secretary is not even seeking review of the propriety of these persons being included in the plaintiff class.

2. The injunction below also provides class members with crucial relief from any ongoing application of an illegal severity standard. As respondents set forth above, the record thus far in this case provides overwhelming evidence that the Secretary has applied an illegal medical threshhold test. The District Court's injunction prevents hardship to class members by halting these practices and assuring that class members will not have to take each case individually to court in order to obtain proper adjudication of their claims. It does not, however, in any way alter the ultimate standards for determining disability.

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[10] Although the District Court order included time limits on readjudication, these time limits only require the Secretary to make good faith efforts to comply with the time limits. The Secretary's most recent report to plaintiffs' counsel shows that of 4150 hearings scheduled pursuant to the injunction, 516 hearings have not yet been held. Decisions have not been rendered in an additional 736 cases. Furthermore, the parties only recently entered into a consent order regarding location of class members. *Dixon v. Heckler*, No. 83-7001 (S.D.N.Y. Nov. 15, 1985) (consent order). Because of delays in negotiating the terms of this order and implementing instructions, many class members who had live claims as of the date this case was filed have not yet had a new hearing scheduled. Thus, there are even more class members who depend on continued enforcement of the preliminary injunction in order to obtain proper adjudication of their claims for benefits.

CONCLUSION

For the above stated reasons, the petition for certiorari should be denied irrespective of this Court's disposition of *Bowen v. Yuckert*, No. 85-1409.

Respectfully submitted,

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